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Samuel
Chase
U.S. Supreme
Court

nited States.
Senate.

REPORT

OF THE

TRIAL

OF THE

HON. SAMUEL CHASE,

ONE OF THE ASSOCIATE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES,

BEFORE THE

HIGH COURT OF IMPEACHMENT,

COMPOSED OF THE

Senate of the United States,

FOR CHARGES EXHIBITED AGAINST HIM BY THE

HOUSE OF REPRESENTATIVES,

In the name of themselves, and of all the People of the United States,

FOR

HIGH CRIMES & MISDEMEANORS,

SUPPOSED TO HAVE BEEN BY HIM COMMITTED;

WITH THE NECESSARY

DOCUMENTS AND OFFICIAL PAPERS,

From his Impeachment to final Acquital.

TAKEN IN SHORT HAND,

BY CHARLES EVANS,

AND THE ARGUMENTS OF COUNSEL REVISED BY THEM

FROM HIS MANUSCRIPT.

BALTIMORE:

PRINTED FOR SAMUEL BUTLER AND GEORGE KEATINGE.

1805.

56

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DISTRICT OF MARYLAND, *to wit.*

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" *Report of the Trial of the* Hon. SAMUEL CHASE, *one of the Associate Justices of the Supreme Court of the United States, before the High Court of Impeachment composed of the Senate of the United States, for charges exhibited against him by the House of Representatives in the name of themselves and of all the people of the United States, for High Crimes and Misdemeanors, supposed to have been by him committed; with the necessary Documants and official Papers, from the Impeachment to final Acquittal. Taken in short hand by Charles Evans, and the arguments of Counsel, revised by them from his manuscript.*

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PHILIP MOORE, *Clk District.*

MARCH 16th, 1805.

ADDRESS TO THE READER.

THE publishers have taken uncommon pains in this edition to collect all the necessary information required; in the performance of that duty they had to encounter a number of difficulties. In the first place, it was impossible to calculate with precision the alterations and corrections of counsel, they not being furnished with their corrected notes until within a few days before they were severally published, and being obliged to calculate a certain quantity of pages for each argument, they have been compelled to print on smaller type in some instances, to meet the space allotted, which in a few places has obliged an unavoidable though intentional wrong numbering of pages by repetition of number, and the which is noticed by a star * to each.

In the proem, they have collected all the necessary information relative to the impeachment by the house of representatives, from the committee of enquiry to the order for the appearance of the honorable respondent.

The testimony is accurately copied from Mr. Evans's notes. The arguments and opinions of counsel have been by them corrected. The arguments of the managers are literally printed from the notes of Mr. Evans; and the publishers would feel happy could they have got their notes corrected; but *having purchased* the notes of the trial from Mr. Evans, with the corrections of counsel, they could not legally hold a copyright in the arguments of the managers, who would be at liberty to print or give their corrected notes to any person who might please to print them. Not having intentionally committed any errors, or in any manner suffered party considerations to bias them, they hope any little inaccuracies of the press may be pardoned, to which the hurry of the work in no small degree contributed.

The PUBLISHERS.

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MANAGERS FOR THE PROSECUTION.

John Randolph, Eſq.
Joſeph H. Nicholſon, Eſq.
Cæſar A. Rodney, Eſq.
—— Early, Eſq.
Waſhington Campbell, Eſq.
—— Clarke, Eſq.

COUNSEL FOR THE RESPONDENT.

Joſeph Hopkinſon, Eſq.
Philip B. Key, Eſq.
Charles Lee, Eſq.
Luther Martin, Eſq.
Robert Goodloe Harper, Eſq.

DIRECTIONS TO THE BINDER.

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INTRODUCTION.

PROCEEDINGS

OF THE

HOUSE OF REPRESENTATIVES

OF THE UNITED STATES,

ON THE

Impeachment of the Hon. Samuel Chaſe.

THURSDAY, *January, 5th* 1804.

On a motion made and ſeconded, that the houſe do come to the following reſolution :—

Reſolved, That a committee be appointed to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and to report their opinion, whether the ſaid Samuel Chaſe hath ſo acted in his judicial capacity, as to require the interpoſition of the conſtitutional power of this houſe.

The houſe proceeded to conſider the ſaid motion at the clerk's table : Whereupon,

A motion was made and ſeconded, that the farther conſideration of the ſaid reſolution be poſtponed until to-morrow.

And debate ariſing thereon,

Another motion was made, and the queſtion being put, that the houſe do now adjourn,

It paſſed in the negative—Yeas 52—Nays 62.

FRIDAY, *January 6th*, 1804.

The houſe reſumed the conſideration of the motion of the fifth inſtant, "for the appointment of a committee to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States,"—and the ſaid motion, as originally propoſed, being again read, in the words following, to wit :—

"*Reſolved*, That a committee be appointed to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and to report their opinion whether the ſaid Samuel Chaſe hath ſo acted in his judicial capacity, as to require the interpoſition of the conſtitutional power of this houſe."

A motion was made and ſeconded, to amend the ſame, by inſerting after the words "one of the aſſociate juſtices of the ſupreme court of the United States," the following words, "and of Richard Peters, diſtrict judge of the diſtrict of Pennſylvania."

And on the queſtion, that the houſe do agree to the ſaid amendment,

It was reſolved in the affirmative—Yeas 79—Nays 37.

The yeas and nays being demanded by one fifth of the members present,

Thoſe who voted in the affirmative are,

Willis Alſton, junior,
Nathaniel Alexander,
Phanuel Biſhop,
William Blackledge,
John Boyle,
Robert Brown,
Joſeph Bryan,
William Butler,
John Campbell,
Joſeph Clay,
John Clopton,
Jacob Crowninſhield,
Richard Cutts,
John Dennis,
William Dickſon,
Peter Early,
James Elliot,
Ebenezer Elmer,
John W. Eppes,
William Euſtis,
William Findley,
James Gilleſpie,
Edwin Gray,
Andrew Gregg,
Thomas Griffin,
John A. Hanna,
Joſiah Haſbrouck,
Seth Haſtings,
William Hoge,
James Holland,
David Holmes,
Benjamin Huger,
John G. Jackſon,
Walter Jones,
William Kennedy,
Nehemiah Knigh',
Michael Leib,
Joſeph Lewis, jun.
Thomas Lowndes,
John B. C. Lucas,
Andrew M'Cord,
David Meriwether,
Nicholas R. Moore,
Thomas Moore,
Jeremiah Morrow,
Anthony New,
Thomas Newton, jun.
Joſeph H. Nicholſon,
Gideon Olin,
John Patterſon,
Oliver Phelps,
John Randolph, jun.
Thomas M. Randolph,
John Rea (of Pennſylvania)
John Rhea (of Tenneſſee)
Jacob Richards,
Eraſtus Root,
Thomas Sammons,
Thomas Sandford,
Ebenezer Seaver,
Thompſon J. Skinner,
James Sloan,
John Smilie,
John Smith (of Virginia)
Richard Stanford,
Joſeph Stanton,
James Stephenſon,
John Stewart,
David Thomas,
Philip R. Thompſon,
John Trigg,
Philip Van Cortlandt,
Iſaac Van Horne,
Joſeph B. Varnum,
Daniel C. Verplanck,
Marmaduke Williams,
Richard Winn,
Joſeph Winſton, and
Thomas Wynns.——79.

Thoſe who voted in the negative are,

Simeon Baldwin,
David Bard,
George Michael Bedinger,
Silas Betton,
Adam Boyd,
William Chamberlin,
Martin Chittenden,
Clifton Claggett,
Manaſſeh Cutler,
Samuel W. Dana,
John Davenport,
Gaylord Griſwold,
Roger Griſwold,
David Hough,
Samuel Hunt,
Thomas Lewis,
Henry W. Livingſton,
William M'Creery,
Nahum Mitchell,
Samuel L. Mitchill,
James Mott,
Bariah Palmer,
Thomas Plater,
Samuel D. Purviance,
Joſhua Sands,
John Cotton Smith,
John Smith, (of N. York)
Henry Southard,
Samuel Taggart,
Samuel Tenny,
Samuel Thatcher,
George Tibbits,
Abram Trigg,
Killian K. Van Renſſelaer,
Peleg Wadſworth,
John Whitehill, and
Lemuel Williams.——37.

The said motion being further amended at the Clerk's table, to read as followeth :—

Resolved, That a committee be appointed to enquire into the official conduct of Samuel Chase, one of the associate justices of the supreme court of the United States, and of Richard Peters, district judge of the district of Pennsylvania, and to report their opinion whether the said Samuel Chase and Richard Peters, or either of them, have so acted in their judicial capacity, as to require the interposition of the constitutional power of this House.

Mr. Speaker stated the question, that the House do agree to the said motion, as so amended,

And debate arising thereon,

An adjournment was called for :—Whereupon,

The several orders of the day were farther postponed until to-morrow.

And then the House adjourned until to-morrow morning, eleven o'clock.

SATURDAY, *January* 7, 1804.

The House resumed the consideration of the question depending yesterday at the time of adjournment "that the House do agree to the motion of the fifth instant, as amended by the House, "for the appointment of a committee to enquire into the official conduct of Samuel Chase, one of the associate justices of the supreme court of the United States, and of Richard Peters, district-judge of the district of Pennsylvania :"—and after farther debate thereon,

A motion was made and seconded, to amend the said motion, by prefixing thereto, a preamble, in the words following, to wit :

"Whereas *information hath been given to the House, by one of its members, that in a certain prosecution for treason, on the part of the United States, against a certain John Fries, pending in the circuit court of the United States in the state of Pennsylvania, Samuel Chase, one of the associate justices of the supreme court of the U. States, and Richard Peters, district judge for the district of Pennsylvania, by whom the said circuit court was then holden, did inform the counsel for the prisoner, that, as the court had formed their opinion upon the point of law, and would direct the jury thereupon, the counsel for the prisoner must confine themselves to the question of fact only : And whereas, it is represented, that in consequence of such determination of the court, the counsel did refuse to address the jury on the question of fact,—and the said John Fries was found guilty of treason, and sentenced by the court to the punishment, in such case, by the laws of the United States, provided,—and was pardoned by the President of the United States.*"

And the said amendment being twice read at the Clerk's table,

A motion was made and seconded, to amend the same, by striking out therefrom,—all the words, from the word "Whereas," in the first line, to the end of the amendment, for the purpose of inserting in lieu thereof, the following words, to wit ;—"members of this House have stated in their places, that they have heard certain acts of official misconduct alledged against Samuel Chase, one of the associate justices of the supreme court of the United States, and Richard Peters, judge of the district court of the district of Pennsylvania :" Whereupon,

A division of the question on the said motion for amendment, was called for,

And on the question, that the House do agree to the motion for striking out the words before recited,

It was resolved in the affirmative—yeas 79—nays 41.

And then the question being put that the House do agree to insert the words before recited, in lieu of the words so stricken out, it was resolved in the affirmative.

The question was then taken, that the House do agree to the said amendment proposed by way of preamble, amended to read, as followeth :

"Whereas members of this House have

ſtated in their places, that they have heard certain acts of official miſconduct alledged againſt Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and Richard Peters, judge of the diſtrict of Pennſylvania."

And paſſed in the negative.

The main queſtion was then taken, that the Houſe do agree to the ſaid motion, as originally propoſed, amended to read, as followeth:

Reſolved, That a committee be appointed to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and of Richard Peters, diſtrict judge of the diſtrict of Pennſylvania, and to report their opinion, whether the ſaid Samuel Chaſe and Richard Peters, or either of them, have ſo acted in their official capacity, as to require the interpoſition of the conſtitutional power of this Houſe.

And reſolved in the affirmative, yeas 81—nays 40.

The yeas and nays being demanded by one-fifth of the members preſent—thoſe who voted in the affirmative, are,

Willis Alſton, junior,
Nathaniel Alexander,
David Bard,
George Michael Bedinger,
Phanuel Biſhop,
William Blackledge,
Adam Boyd,
John Boyle,
Robert Brown,
Joſeph Bryan,
William Butler,
Levi Caſey,
Joſeph Clay,
John Clopton,
Jacob Crowningſhield,
Richard Cutts,
William Dickſon,
John B. Earle,
Peter Early,
Ebenezar Elmer,
John W. Eppes,
William Euſtis,
William Findley,
John Fowler,
John Gilleſpie,
Edwin Gray,
Andrew Gregg,
John A. Hanna,
Joſiah Haſbrouck,
William Hoge,
James Holland,
David Holmes,
John G. Jackſon,
Walter Jones,
William Kennedy,
Nehemiah Knight,
Michael Leib,
John B. C. Lucas,
Matthew Lyon,
Andrew M'Cord,
David Merriwether,
Nicholas R. Moore,
Thomas Moore,
Jeremiah Morrow,
Anthony New,
Thomas Newton, jun.
Joſeph H. Nicholſon,
Gideon Olin,
Beriah Palmer,
John Patterſon,
Oliver Phelps,
John Randolph, junior,
Thomas M. Randolph,
John Rea, (of Pennſylvania)
John Rhea, (of Tenneſſee)
Jacob Richards,
Eraſtus Root,
Thomas Sammons,
Thomas Sandford,
Ebenezer Seaver,
Tompſon J. Skinner,
James Sloan,
John Smilie,
John Smith, (of Virginia)
Richard Stanford,
Joſeph Stanton,
John Stewart,
David Thomas,
Philip R. Thompſon,
Abram Trigg,
John Trigg,
Philip Van Cortlandt,
Iſaac Van Horne,
Joſeph B. Varnum,
Daniel C. Verplank,
Matthew Walton,
John Whitehill,
Marmaduke Williams,
Richard Winn,
Joſeph Winſton, and
Thomas Wynns.——81.

Thoſe who voted in the negative, are,

Simeon Baldwin,
Silas Betton,
John Campbell,
William Chamberlin,
Martin Chittenden,
Clifton Claggett,
Manaſſeh Cutler,
Samuel W. Dana,
John Davenport,
John Dennis,
Thomas Dwight,
James Elliot,
Thomas Griffin,
Gaylord Griswold,
Roger Griswold,
Seth Haſtings,
David Hough,
Benjamin Huger,
Samuel Hunt,
Joſeph Lewis, jun.
Thomas Lewis,
Henry W. Livingſton,
Thomas Lowndes,
Nahum Mitchell,
Samuel L. Mitchill,
James Mott,
Thomas Plater,
Samuel D. Purviance,
Joſhua Sands,
John Cotton Smith,
John Smith, (of New-York)
William Stedman,
James Stephenſon,
Samuel Taggart,
Samuel Tenney,
Samuel Thatcher,
George Tibbits,
Killian K. Van Renſſellaer,
Peleg Wadſworth, and
Lemuel Williams.——40.

Ordered, That Mr. John Randolph, junior, Mr. Nicholfon, Mr. Joſeph Clay, Mr. Early, Mr. Roger Griſwold, Mr. Huger, and Mr. Boyle, be appointed a committee purſuant to the ſaid reſolution.

An adjournment was then called for.

—

"*The committee appointed 7th Jan. to enquire into the official conduct of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and of Richard Peters, diſtrict judge of the diſtrict of Pennſylvania, and to report their opinion, whether the ſaid Samuel Chaſe and Richard Peters, or either of them have ſo acted, in their judicial capacity, as to require the interpoſition of the conſtitutional power of this houſe*"

REPORT—

That in conſequence of the evidence collected by them, in virtue of the powers with which they have been inveſted by the houſe, and which is hereunto ſubjoined, they are of opinion,

1. That Samuel Chaſe, eſquire, one of the aſſociate juſtices of the ſupreme court of the United States, be impeached of high crimes and miſdemeanors:

2. That Richard Peters, diſtrict judge of the diſtrict of Pennſylvania, hath not ſo acted in his judicial capacity as to require the interpoſition of the conſtitutional power of this houſe.

—

MONDAY, JANUARY 30.

Mr. J. Randolph, in the name of the committee appointed to enquire into the conduct of Samuel Chaſe and Richard Peters, ſtated that documents had been received by them, which occupied a conſiderable bulk, the printing of which would conſiderably aſſiſt their inveſtigation, by rendering them more convenient for peruſal. He added, that it would probably be neceſſary to print theſe papers, for the information of the houſe when the report of the committee was made. He therefore moved the veſting in them authority to cauſe to be printed ſuch papers as they might conceive proper.

The motion was carried—Ayes 59, Noes 31.

MONDAY, MARCH 12.

The houſe went into a committee of the whole—Mr. Varnum in the chair—on the following report:

The committee REPORT—

That in conſequence of the evidence collected by them, in virtue of the powers with which they have been inveſted by the houſe, and which is hereunto ſubjoined, they are of opinion,

1ſt. That Samuel Chaſe, eſq. one of the aſſociate juſtices of the ſupreme court of the United States, be impeached of high crimes and miſdemeanors:

2d That Richard Peters, diſtrict judge of the diſtrict of Pennſylvania, hath not ſo acted in his judicial capacity, as to require the interpoſition of the conſtitutional power of this houſe.

The queſtion was then taken by yeas and nays, on concurring in the report of the committee, agreeing to the firſt reſolution, and carried. Yeas 73, Nays 32.

The report of the committee, in relation to the ſecond reſolution, was agreed to unanimouſly.

Mr. J. Randolph moved, that a committee be appointed to appear at the bar of the Senate, to impeach, in the name of the Houſe of repreſentatives, Samuel Chaſe, of high crimes and miſdemeanors.

The motion was adopted, and Meſſrs. J. Randolph and Early appointed the committee.

—

FROM THE FEDERAL GAZETTE.

TO THE EDITORS.

GENTLEMEN,

As ſoon as there appeared reaſon for believing that the houſe of repreſentatives intended to adjourn, without preferring articles before the ſenate, in ſupport of the impeachment voted againſt me, the incloſed memorial was prepared, and tranſmitted (on Saturday laſt) to a member, with a requeſt that he would preſent it, if ſuch an intention ſhould be aſcertained to exiſt. On laſt Monday, the morning of the day previouſly fixed for adjournment by a joint reſolution of both houſes, articles of impeachment were reported by the committee; but it was clearly impoſſible for the houſe to act upon them; nor does the time until which they were kept back, leave the leaſt room for ſuppoſing, that the committee who made the report, intended that they ſhould be acted upon before adjournment.

But whatever may have been the intention with which they were reported at ſuch a time, the effect undoubtedly will be, that they will paſs into the public prints, under the ſanction of a committee of congreſs, and even under the apparent ſanction of the houſe itſelf; and that as they contain the moſt aggravated and inflamed conſtruction, which it was poſſible for paſſion and party ſpirit to put on the ex-parte evidence, whereon the vote of impeachment was founded, they will become a very powerful engine in the hands of calumniators and party zealots, for heightening to the utmoſt the prejudices and odium, which all the former proceedings in this caſe are ſo well calculated to excite.

The report of theſe articles, prevented the memorial from being preſented; the member to whom it was ſent having been of opinion, that the caſe, in which it was my wiſh to have

it presented, did no longer exist. But as these articles have not been adopted by the house, or even considered; as they must be taken up at next session, and may then be rejected, or wholly varied; as the charges which I am to answer, and against which I ought to have been placed in a situation to prepare for defending myself, are thus left in the same state of uncertainty as before the report; and as this report far from accomplishing the object, which the memorial seeks, can have no other effect than to encrease and aggravate the injustice whereof it complains; I deem it proper now to make it public, as an appeal to my country, to the world, and to posterity, against the injuries and illegality of the proceedings in this case, and as a solemn protest against the principles on which they are founded. I therefore request that you will please to insert it, with this letter, in your useful and respectable paper.

That it may be seen that my impression of the articles reported by the committee is not erroneous, I enclose a copy of them, and request that you will insert them after the memorial. It is proper to state that four (I believe) of the five members of the committee, who reported the articles, were the same members who collected and reported the testimony; and that fourteen days elapsed between the time when this committee was ordered to report articles, and the time when the report was actually made. This fact will assist in forming a judgement, as to the views with which it was kept back until the last day of the session. Had the report been made sooner, as it might easily have been, the articles might have been rejected by the house; or might at least have been deprived, by amendments, of part of their wanton venom and abuse.

I am, gentlemen,
Your obedient servant,
SAMUEL CHASE.

Baltimore, March 29, 1804.

To the Hon. the House of Representatives of the United States.

The Memorial of SAMUEL CHASE, *one of the associate justices of the supreme court of the United States.*

With the respect due to a branch of the government of his country; but with the frankness which conscious and injured innocence has a right to assume, and which an early, zealous, and constant supporter of the American liberty, ought to use; your memorialist approaches your honorable body, to lay his complaints at your feet, and to call on your justice for redress.

He has delayed this step until so late a period of the session, because he still indulged the hope, that your honorable body would not adjourn, without reducing the charges against him to some specific form; so that he might be enabled to know of what he is accused, and to direct his attention immediately to the means necessary for proving his innocence, and vindicating his character. But finding, at last, that an adjournment is about to take place, without any thing of this kind being done; that a vote of impeachment, resting on no precise or specific charges or facts, and supported only by ex-parte testimony, is about to be left hanging, for a whole year, over his head; and that the publication of this testimony is permitted, in such a way as to render it most injurious to his reputation, without leaving to him the possibility of combating it by counter-proof: his duty to that character, which he has supported unimpeached during a period of forty years, through all the troubles, difficulties, and dangers of the American revolution; to his family, whose happiness, respectability, and establishment in life, are materially implicated in whatever concerns his good name; to his country, which has honored him with many high and important trusts; to his office, which requires a reputation not only unspotted but unsuspected; and to himself, forbids him to remain longer in silence.

He therefore respectfully solicits and intreats, that your honorable body will not suffer an adjournment to take place, until articles of impeachment shall have been preferred against him. Thus, although an immediate trial, which his feelings would lead him to prefer, may not be possible at this protracted period of the session, still he will be enabled, knowing the precise charges against him, to make vigorous, speedy and effectual preparations for his defence, to repel the malignant calumnies by which he is industriously and unceasingly assailed, and fully to vindicate that innocence, for which he solemnly appeals to the Almighty Searcher of hearts, to the testimony of his own conscience, to his country, and to an impartial posterity. He is far from arrogating to himself an exemption from the usual portion of human frailty: But for the purity of his intentions, for the uprightness of his conduct, and for the faithful and conscientious discharge of his official duties, on all occasions, according to the best lights of his understanding: He confidently appeals to that dread Tribunal where he and his accusers must one day appear, where the inmost recesses of all hearts shall be laid open, the most hidden motives of conduct shall be revealed, and calumny, malice, and party-rage, shall forever be put to silence.

He is the more strongly induced to urge this request, and to express his earnest hope that it will not be refused, by those reflections which it has not been in his power to avoid making, on the course hitherto pursued in this prosecution.

That charges so weighty as to render a judge of the supreme court a fit object of impeach-

ment for high crimes and misdemeanors, should have been suffered to rest in oblivion for four years; although they are founded on facts perfectly notorious in their nature, and perfectly well known to the persons who, after so great a lapse of time, have at length made them the ground of a prosecution the most solemn known to our laws; that this prosecution so long delayed, should be commenced precisely at the moment when a political change supposed by many, though he hopes unjustly, to be favorable to its success had taken place; are circumstances but little calculated to impart confidence to the heart of innocence, or to quiet those alarms which she may feel when opposed to uncontrolled power.

Nor is the manner of commencing this prosecution, more consoling than the time. A formal enquiry into the official conduct of a judge, must always be to him a matter of very serious moment. It must always expose him to very great uneasiness, and may render him obnoxious to the most unjust and injurious suspicions. It is wholly inconsistent with the humane and just principles of our laws, to subject a citizen to evils of this kind, without some specific accusation, resting on facts precisely stated, and supported by such proof on oath, as renders their existence at least probable. No man, however mean his condition, or however infamous his character, can be bound over to undergo the enquiry of a grand jury, without such an accusation, and such proof. A grand jury cannot listen to any accusation against a man, nor enquire into his conduct, much less put him upon his trial by finding a presentment against him, unless such an accusation so supported, be first adduced; and the person maliciously instigating the inquiry is liable, in case it should be rejected, to a suit for reparation by the accused party. All these just and humane provisions are established by our laws, for the protection of innocence, not merely from punishment, but also from unfounded and vexatious enquiry. Every principle of reason, of justice, and of law, and every precedent that deserves or has received the weight of authority, concur in requiring the full application of these provisions to the case of impeachment.

And yet in this prosecution all these provisions have been completely disregarded. An enquiry has been instituted, of the most serious import to the party accused, on the mere suggestion of a member in his place, unsupported by oath, or by any specific statement of facts, which if supported by oath, would have justified an enquiry. This enquiry, thus instituted in a manner the most unprecedented and alarming, far from being confined to any specific charge or fact, is extended to the whole official conduct of a judge who has been above eight years in office, and authorises the most minute inquisition of his most unguarded and inconsiderable words and actions, throughout the whole period. It cannot escape your honorable body, how formidable an engine of oppression such an enquiry must be, in the hands of persons disposed to abuse it. Your memorialist is far from insinuating that such has been the case in the present instance. This insinuation he could not make or even suspect to be well founded, without derogating from the respect that ought to be inspired by so elevated a body; but the soundness of principles is in no manner so well tested as by the consequences to which they lead. And although it cannot be suspected that this honorable body is under the influence of party spirit, party views, or individual malice, yet it is a melancholy truth that free governments are liable to the influence of party spirit, and that when this fatal passion takes full possession of the mind, it completely stifles every sentiment of justice and humanity, all regard for law and right. Should the time ever arrive, which God avert! when a majority of congress, inflamed by party spirit, and seeking the destruction of its opponents, shall desire to criminate a judge, in order to heap odium on the party with which he is connected; when a president at the head of this majority and guiding its passions, shall desire, from motives of private resentment, the ruin of any judge; when the schemes of the dominant party, or of its leader, may require the removal of all firm, upright and independent judges, and the substitution of others more complying or more timid; when the necessities of a favorite partizan may require the removal of a judge, in order to create a vacancy in office; should such a disastrous period ever arrive, as the history of other free governments informs us it may, in what manner will the devoted victim, however innocent, be able to shield himself against the thrusts of such a weapon, as this species of enquiry, instituted in such a manner and on such principles, cannot fail to furnish? Your memorialist trembles for the honor of his country, and for the success of republican government in this her last and fairest experiment, much more than for his own safety, when he reflects on the excesses that under such a cloak may be committed.

Does the manner in which this enquiry has been conducted, present any considerations calculated to remove or diminish the alarm excited by its commencement? Far otherwise! A great mass of testimony has been taken, which though calculated to affect your memorialist in the most material manner, he has had no opportunity of confronting, cross-examining, or explaining. This testimony, in the taking of which some individuals were allowed to indulge themselves in the most rancorous invectives against your memorialist, and to cloath with the formalities and sanction of an oath, the malicious effusions of their unprovoked and implacable resentment; this testimony, thus tarnished with the deep stain of partiality, hatred and revenge, was printed piece-meal, in the progress of the ex-

quiry, and though not immediately published, was placed in a condition to be extensively circulated, and thus to be employed as a mean of deeply wounding the reputation of your memorialist, of exciting universal odium against him, and of preparing the way for a certain condemnation, when a clamor shall have been excited, strong enough to drown the voice of reason, truth and justice.

Your memorialist by no means wishes to be understood as insinuating that such was the intention wherewith this step was taken, his respect for the body by which it was authorised, forbids him to harbor such a suspicion. But such may be the effect, and such it must be, in his apprehension, unless your honorable body, by preparing specific charges against him immediately, shall enable him to prepare speedily and efficaciously for justifying his conduct and defending his character, against the unjust and wanton aspersions with which this testimony abounds.

The recent publication of this testimony, in a gazette understood to be the official organ of the government, and thence communicating an official character and sanction to whatever of this nature appears in it, is a circumstance calculated to increase, in a very great degree, the mischievous effects of the testimony itself, and renders still more important the measure which your memorialist so earnestly solicits. From this gazette, the publication will pass into others; and thus the most virulent misrepresentations of his conduct, and slanders on his character, sanctioned too, in some degree, by the vote of impeachment, will be spread throughout the United States; and will even extend to foreign countries; while the opportunity of refuting them, must, of necessity, be delayed for a considerable time, and if articles of impeachment are not immediately exhibited, may be postponed to a very distant period.

He is still more strongly impressed with the necessity of demanding, as a sacred right, this immediate exhibition of articles, when he reflects on the manner in which the impeachment was voted. It is in vain that he has looked, in this vote and in the report of the committee on which it is founded, for a statement or even a hint of the offences with which he stands charged. He is impeached of "high crimes and misdemeanors;" but in what these high crimes and misdemeanors consist, when, how and where they were committed, is no where declared. The testimony collected by the committee, does indeed state a variety of facts, which may constitute the grounds of accusation. The principles of justice and law, and the uniform course of practice, united in requiring, that each of these facts, or each that it is intended to rely on, should be put by the committee into the form of a specific charge, and made the subject of a distinct resolution. The sense of the house would then have been expressed on every charge, separately, and each would have been supported or rejected, according to the opinion entertained by the majority respecting its truth and its sufficiency. Your memorialist would then have known, even without articles, what it is, of which he stands accused, and to what points to direct his preparations for defence. His family, his friends, his country, and the world, would have known what it is that has been called "high crimes and misdemeanors;" and would have been enabled to judge how far the accusation is supported by the facts, and the facts by the proof.

There is another point of view in which your memorialist deems it his sacred duty, a duty to his country more than to himself, a duty which no consideration shall prevent him from performing, to enter his most solemn protest against this part of the proceeding. His protest may not now be heard. The passions and prejudices of the moment may drown his voice. But it will one day be heard and seriously listened to. The American people will hear it, posterity will hear it; and the lovers of liberty, in every age and country, will unite in asserting the justice of his complaint.

He complains that by the method pursued in voting this impeachment, a majority has been obtained in favor of the general vote, while it is possible and even probable, that there is not a majority in favor of any one of the seperate charges on which the vote is founded. The accusations against him, so far as can be collected from the testimony and from the speeches of members, are very various. Let it be supposed that four charges are chiefly relied on, viz the trial of Fries, the trial of Callender, the proceedings at New Castle, and the charge to the grand jury in Baltimore. It is perfectly manifest that these charges are wholly distinct, and cannot support or strengthen each other. Each is a misdemeanor in itself, or it is not. Therefore there ought to be a majority in favor of each separately, before it can be made the ground of impeachment.

Let it then be supposed, which is not only possible but highly probable, that thirty members and no more, considered the conduct of your memorialist in the trial of Fries, as a proper ground of impeachment. In that case it is manifest that your memorialist ought not to be impeached on that charge, there not being a majority in favor of it. In like manner there may have been but thirty members in favor of impeaching him on account of Callender's trial; and so of the other two charges. Thus although there might be but thirty members in favor of impeaching, on any one of the four charges, in which case it is manifest that there ought to be no impeachment; yet, when all the charges are blended into one general question, every members who considers any one charge as a proper ground of impeachment,

and all the others as not proper grounds, muſt vote in the affirmative ; and thus there will appear a great majority in favor of a meaſure, which is actually diſapproved by a great majority. This is an innovation ſo ſtriking, ſo alarming, ſo repugnant to all former practice, and to all ideas of juſtice and law, that it may be ſafely pronounced to furniſh, eſpecially when combined with the principles of indefinite enquiry without previous ſpecific allegations, and of ex-parte teſtimony, the moſt formidable, the moſt irreſiſtible engine of oppreſſion, under the forms of law, that was ever placed in the hands of power ; and if the time ſhould ever arrive, which Heaven in its mercy avert ! When this engine ſhall be wielded under the direction of party ſpirit, or of popular paſſion inſtigated by perſonal malice or ſiniſter policy, dreadful indeed will be the condition of thoſe whom it may be the object of the moment to deſtroy.

Againſt an accuſation thus prepared, and thus preferred, it behoves your memorialiſt to make the earlieſt and the moſt efficacious preparations for defending his character and aſſerting his innocence. While the accuſation reſts in its preſent vague ſtate, he knows not to what points to direct theſe preparations ; and in the mean time the fulleſt ſcope is given to calumny and malevolence ; ſuſpicion, ever alive and buſy, is left free to act ; and the moſt efficacious means are afforded, for overwhelming with public odium an innocent man, who, until the age of ſixty-three, has maintained an unſpotted reputation ; who bore an early and not an unimportant part in our common ſtruggle for liberty ; and who, after diſcharging with honor, many moſt important truſts conferred on him by his fellow citizens, was raiſed by Waſhington, the witneſs of his ſervices, and often the companion of his exertions, to that high office, his conduct in which, though now the ſubject of accuſation, has always been regulated by the moſt conſcientious regard to his duty and his oath.

Theſe are injuries to which he cannot ſuppoſe that your honorable body will ſuffer him to remain expoſed. He therefore preſumes to ſolicit, moſt reſpectfully, but moſt earneſtly ; and confidently hopes that your honorable body will not adjourn without preferring articles of impeachment againſt him, and thus reducing to preciſe form, that accuſation which in its preſent vague and general ſtate, it is impoſſible for him to repel. Could an immediate trial be had, it would be far moſt agreeable to his feelings ; but as circumſtances render it impoſſible that he ſhould be gratified in that extent, he forbears to aſk it ; and confines himſelf to that requeſt, which it is, he conceives, perfectly eaſy for your honorable body to grant.

SAMUEL CHASE.

Baltimore, 24th March, 1804.

Mr. Randolph, from the committee appointed for that purpoſe, made on Monday the following report, which was ordered to lie on the table.

REPORT

Of the committee appointed to prepare articles of impeachment againſt SAMUEL CHASE, *one of the aſſociate juſtices of the ſupreme court of the United States.*

ARTICLES

Exhibited by the Houſe of Repreſentatives of the United States, in the name of themſelves and of all the people of the United States, againſt Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, in maintenance and ſupport of their impeachment againſt him for high crimes and miſdemeanors.

ARTICLE I.

That, unmindful of the ſolemn duties of his office, and contrary to the ſacred obligation by which he ſtood bound to diſcharge them faithfully and impartially, and without reſpect to perſons, the ſaid Samuel Chaſe, on the trial of John Fries, charged with treaſon, before the circuit court of the United States, held for the diſtrict of Pennſylvania, in the city of Philadelphia, during the months of April and May, one thouſand, eight hundred, whereat the ſaid Samuel Chaſe preſided, did in his judical capacity, conduct himſelf in a manner highly arbitrary, oppreſſive and unjuſt, viz.

1. In delivering an opinion, in writing, on the queſtion of law, on the conſtruction of which the defence of the accuſed materially depended, tending to prejudice the minds of the jury againſt the caſe of the ſaid John Fries, the priſoner, before counſel had been heard in his defence :

2. In reſtricting the counſel for the ſaid Fries from recurring to ſuch Engliſh authorities as they believed applicable, or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions, upon which they intended to reſt the defence of their client :

3. In debarring the priſoner from his conſtitutional privilege of addreſſing the jury (thro' his counſel) on the law as well as on the fact, which was to determine his guilt or innocence, and at the ſame time endeavoring to wreſt from the jury their indiſputable right to hear argument, and determine upon the queſtion of law, as well as the queſtion of fact, involved in the verdict which they were required to give:

ARTICLE II.

That in conſequence of this irregular conduct of the ſaid Samuel Chaſe, as dangerous to our liberties, as it is novel to our laws and uſages,

the said John Fries was deprived of the right, secured to him by the eighth article amendatory of the constitution, and was condemned to death without having been heard by counsel, in his defence, to the disgrace of the character of the American Bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people.

ARTICLE III.

That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, one thousand eight hundred, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then president of the United States, the said Samuel Chase, with intent to oppress and procure the conviction of the said Callender, did overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind as to the publication from which the words charged to be libellous in the indictment, were extracted; and the said Basset was accordingly sworn, and did serve on the said jury.

ARTICLE IV.

That, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender was not permitted by the said Samuel Chase to be given in because the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact.

ARTICLE V.

That the conduct of the said Samuel Chase was marked, during the whole course of the said trial by manifest injustice, partiality and intemperance, viz.

1. In refusing to postpone the trial although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused.

2. In the use of unusual, rude and contemptuous expressions towards the prisoner's counsel; and in insinuating that they wished to excite the public fears and indignation and to produce that insubordination to law, to which the conduct of the judge did, at the same time manifestly tend:

3. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which at length induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment:

4. In an indecent solicitude, manifested by the said Samuel Chase for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge as it was subversive of justice.

ARTICLE VI.

That, at a circuit court of the United States, for the district of Delaware, held at New Castle, in the month of June, one thousand eight hundred, whereat the said Samuel Chase presided--the said Samuel Chase, disregarding the duties of his office, did descend from the dignity of a judge and stoop to the level of an informer, by refusing to discharge the grand jury, although entreated by several of the said jury so to do; and after the said grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury, that he, the said Samuel Chase, understood "that a highly seditious temper had manifested itself in the state of Delaware, among a certain class of people, particularly in New Castle county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order; that the name of this printer was"—but checking himself, as if sensible of the indecorum which he was committing, added, "that it might be assuming too much to mention the name of this person, but it becomes your duty, gentlemen, to enquire diligently into this matter;" and that with intention to procure the prosecution of the printer in question, the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States the necessity of procuring a file of the papers to which he alluded, (and which were understood to be those published under the title of "Mirror of the Times and General Advertiser") and by a strict examination of them, to find some passage which might furnish the ground work of a prosecution against the printer of the said paper; thereby degrading his high judicial functions, and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare.

ARTICLE VII.

And whereas mutual respect and confidence between the governments of the United States and those of the individual states, and between the people and those governments respectively, are highly conducive to that public harmony, without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at a circuit court, for the district of Maryland, held at Baltimore, in the month of May, one thousand eight hundred and three, pervert

his official right and duty to addreſs the grand jury then and there aſſembled, on the matters coming within the province of the ſaid jury, for the purpoſe of delivering to the ſaid grand jury an intemperate, inflamatory and political harangue, with intent to excite the fears and reſentment of the ſaid grand jury, and of the good people of Maryland, againſt their ſtate government and conſtitution, a conduct highly cenſurable in any, but peculiarly indecent and unbecoming in a judge of the ſupreme court of the United States; and moreover that the ſaid Samuel Chaſe, then & there under pretence of exerciſing his judicial right to addreſs the ſaid grand jury as aforeſaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the ſaid grand jury, and of the good people of Maryland againſt the government of the United States, by delivering opinions which, even if the judicial authority were competent to their expreſſions, on a ſuitable occaſion and in a proper manner, were at that time and as delivered by him, highly indecent, extra-judicial, and tending to proſtitute the high judicial character with which he was inveſted, to the low purpoſe of an electioneering partizan.

And the houſe of Repreſentatives, by proteſtation, ſaving to themſelves the liberty of exhibiting at any time hereafter, any farther articles or other accuſation or impeachment againſt the ſaid Samuel Chaſe, and alſo of replying to his anſwers which he ſhall make unto the ſaid articles, or any of them, and offering proof to all and every the aforeſaid articles, and to all and every other articlss, impeachment, or accuſation, which ſhall be exhibited by them, as the caſe ſhall require, do demand that the ſaid Samuel Chaſe may be put to anſwer the ſaid crimes and miſdemeanors, and that ſuch proceedings, examinations, trials and judgments may be thereupon had and given, as are agreeable to law and juſtice.

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NOVEMBER 6th. 1804.

Mr. J. Randolph requeſted information from the chair as to the ſituation in which the articles of impeachment againſt Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United Staees, were left at the laſt ſeſſion. The houſe would recollect that they were then merely reported and ordered to be printed. If that buſineſs was to be proſecuted, he conceived it of importance that the party ſhould have all the time to prepare for his defence that their political exiſtence would allow him. Was it the opinion of the ſpeaker that this ſubject was before the committe of reviſal and unfiniſhed buſineſs, or ſhould it be referred to a ſpecial committee to prepare articles de novo.

The ſpeaker judged that it was before the committee of reviſal and unfiniſhed buſineſs as a matter of courſe.

On motion of Mr. J. Randolph, a ſelect committee, to conſiſt of five members, was ordered to report on the articles of impeachment againſt S. Chaſe, one of the aſſociates juſtices of the ſupreme court of the United States.

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NOVEMBER 30th. 1804.

Mr. J. Randolph from the committee appointed on the 6th inſt. reported articles of impeachments againſt judge Chaſe. They were nearly the ſame as reported at the laſt ſeſſion except the 5th and 6th articles which are new ones.

Mr. J. R. moved to refer them to a committee of the whole on Monday next.

Mr. Elliott roſe to move a more diſtant day, and to aſſign his reaſons for the motion. It had been to him a ſubject of conſiderable regret that the preſent report had been ſo long delayed, and he had repeatedly examined his own mind to imagine reaſons for the delay. Twenty-four days ago the gentleman who now preſented the report, announced to the houſe his conviction that all the time which our political exiſtence would allow ſhould be given to the perſon accuſed for the purpoſe of making his defence; and he moved a recommitment of the report of the laſt ſeſſion for the purpoſe of alteration or amendment. A ſolution of the difficulties which have occupied my mind upon this ſubject, ſaid Mr. E. may perhaps be found in the report itſelf. If I underſtand it, it embraces accuſations, the evidence of which repoſe in the breaſts of the committee alone, as it has never been exhibited to the houſe. This courſe of proceeding may be parliamentary and proper, but it ſtrikes my mind as poſſeſſing a very different character. At the laſt ſeſſion a voluminous body of evidence was reported, upon which the houſe decided the general queſtion of impeachment. The committee appointed to prepare and report articles of impeachment, poſſeſs not the powers of a committee of enquiry; the enquiry is already at an end; they are only to reduce to form the deciſion of the houſe upon the evidence before them; and if they have proceeded to make a new enquiry, to obtain new evidence, and report new articles thereon, they have wandered beyond the limits of their duty. Nor am I furniſhed with that intuitive knowledge of right and wrong in caſes of this kind, which would be neceſſary to enable me to decide almoſt inſtantly upon a queſtion of ſuch magnitude. While it is our duty to grant a reaſonable time to the perſon accuſed to make his defence, it is indiſpenſably neceſſary to proceed not only with deliberation but with caution. He concluded by moving that the report be made the order for Thurſday next.

The queſtion was taken on Thurſday as the moſt diſtant day, and loſt, 40 voting for and 68 againſt it.

Wedneſday was next tried and loſt.

It was then ordered for Monday, and in the mean time to be printed.

DECEMBER 1ſt. 1804.

The meſſage received yeſterday from the ſenate was read, containing a reſolution directing the ſecretary of the ſenate to ſummon Samuel Chaſe, one of the aſſociate juſtices of the United States, to anſwer the articles of impeachment, and that the return thereof be made the 2d of January, and that the ſervice ſhould be at leaſt 15 days before the return day.

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TUESDAY, December 4, 1804.

The houſe reſumed the conſideration of the report of the committee made the thirtieth ultimo, to whom was referred the report of a ſelect committee appointed on the 13th of March laſt, "to prepare and report articles of impeachment againſt Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the U. States;" and the amendments yeſterday reported thereto from the committee of the whole houſe, being twice read, were, on the queſtion ſeverally put thereupon, diſagreed to by the houſe.

The articles of impeachment contained in the ſaid report, as originally propoſed by the ſelect committee. [See appendix.]

And then the main queſtion being taken, that the houſe do concur with the ſelect committee, in their agreement to the ſaid articles of impeachment as originally propoſed, and herein before recited.

It was reſolved in the affirmative.

On a motion made and ſeconded, that the houſe do come to the following reſolution:

Reſolved, That managers be appointed, by ballot, to conduct the ſaid impeachment on the part of this houſe.

The houſe proceeded to take the ſaid motion into conſideration: When

An adjournment being called for,

The houſe adjourned until to-morrow morning, eleven o'clock.

—

WEDNESDAY, December 5, 1804.

The houſe reſumed the conſideration of the motion depending yeſterday at the time of adjournment, "for the appointment of managers to conduct the impeachment of Saml. Chaſe, on the part of this houſe:" Whereupon,

Reſolved, That ſeven managers be appointed, by ballot, to conduct the impeachment exhibited againſt Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States.

The houſe then proceeded by ballot, to the choice of the ſaid managers; and, upon examining the ballots, the following members appeared to be duly elected by a majority of the votes of the whole houſe, as ſix of the ſaid managers, to wit:

Mr. John Randolph,
Mr. Rodney,
Mr. Nicholſon,
Mr. Early,
Mr. Boyle, and
Mr. Nelſon.

The houſe proceeded to a ſecond ballot for another manager, when the ballots being examined, it appeared no member had a majority of the votes of the whole houſe, but that the higheſt number of votes was given in favor of Mr. George Waſhington Campbell: Whereupon,

Mr. Speaker decided, that it being provided by a ſtanding rule and order of the houſe, that in caſe of any ſecond ballot of the houſe, in which the number required to compoſe a committee, ſhall not be elected by a majority of the votes given, on the ſaid ſecond ballot, a plurality of votes ſhall prevail; and therefore, that in his opinion, the ſaid George Waſhington Campbell, was duly elected as the ſeventh manager to conduct the impeachment againſt the ſaid Samuel Chaſe.

From which deciſion, an appeal was made to the houſe by two members;

And on the queſtion, "Is the ſaid deciſion of the chair in order?"

It paſſed in the negative.

The houſe then proceeded to a further ballot for the ſaid ſeventh manager, and upon examining the ballots, Mr. George Waſhington Campbell, appeared to be duly elected by a majority of the votes of the whole houſe.

On motion,

Reſolved, That the articles agreed to by this houſe, to be exhibited in the name of themſelves, and of all the people of the United States, againſt Samuel Chaſe, in maintenance of their impeachment againſt him for high crimes and miſdemeanors, be carried to the ſenate by the managers appointed to conduct the ſaid impeachment.

On motion,

Ordered, That a meſſage be ſent to the Senate, to inform them that this houſe have appointed managers to conduct the impeachment againſt Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, and have directed the ſaid managers to carry to the ſenate, the articles agreed upon by this houſe, to be exhibited in maintenance of their impeachment againſt the ſaid Samuel Chaſe; and that the clerk of this houſe do go with the ſaid meſſage.

—

DECEMBER 7th.

A meſſage was received from the ſenate informing, that they would be ready to receive the articles of impeachment againſt Samuel Chaſe, eſq. one of the aſſociate juſtices of the ſupreme court, at 1 o'clock this day.

Mr. Randolph from the managers appointed on the part of the houſe of repreſentatives againſt Samuel Chaſe, reported that, the managers did this day carry to the ſenate the articles of impeachment agreed to by the houſe the 30th ultimo: and that the ſaid managers were informed by the ſenate that their houſe would take proper meaſures relative to the ſaid impeachment, of which this houſe ſhould be duly notified.

TRIAL

OF THE

HON. SAMUEL CHASE.

Wednesday, January 2nd, 1805.

THE senate chamber was fitted up in a handsome style as a court—and laid out into apartments for the Senators the House of Representatives, the managers, the accused, and counsel—the members of the executive departments, besides a semi-circular gallery constructed within the area of the chamber, which forms from its front an amphitheatre contiguous with the fixed gallery of the Senate chamber.

On the right and left of the President of the Senate, and in a right line with his chair, there are two rows of benches, with desks in front, and the whole front and seats covered with crimson cloth; so that the senators front the auditory.

The Secretary of the Senate retains his usual station in front of the President's chair—on the left of the secretary is placed the sergeant at arms of the Senate, and on his right the sergeant at arms of the House of Representatives.

A temporary semi-circular gallery, which consists of three ranges of benches, is elevated on pillars, and the whole front and seats thereof covered with green cloth—At the angles or points of this gallery, there are two boxes which project into the area about three feet from the line of the front, which save the abruptness of a square termination, and add considerably to the effect of the coup d'œil. In this gallery ladies are accommodated, and they assemble in numbers.

On the floor, beneath this temporary gallery, three benches are provided rising from front to rear, and also covered with green cloth—these benches are occupied by the members of the House of Representatives—on the right there is a spacious box appropriated for the members of the executive department, foreign ministers, &c. &c.

A passage is opened in front from the President's chair to the door—on the right and left hand of the President, and in front of the members of the House of Representatives, are two boxes of two rows of seats—that facing the President's right, is occupied by the managers—that on the other side of *the bar* for the accused and his counsel—these boxes are covered with blue cloth.

The marshal of the district, and a number of his officers, have stations in the avenues of the court and in the galleries.

Mr. *Otis* (Secretary) read the return on the summons of Samuel Chase, made by Mr. Mathers, sergeant at arms, who was sworn that he served the said Samuel Chase with a copy of the summons and a copy of the articles of impeachment.

Proclamation was made that Samuel Chase appear conformably to the summons, or that his default would be recorded.

Samuel Chase appeared accordingly.

The President of the Senate (Mr. Burr) informed Mr. Chase, that having been summoned to answer the articles of impeachment exhibited against him by the House of Representatives, the Senate were ready to receive any answer he had to make.

Mr. Chase requested the indulgence of a chair, which being immediately furnished, he seated himself near the centre of the area of the Senate chamber in front of the President. The members were seated in boxes, covered with crimson, on each side of the President, and in a line with his chair.

Mr. Chase rose and made the following

ADDRESS.

Mr. President,

I appear in obedience to a summons from this honourable court to answer articles of impeachment exhibited against me, by the honourable the House of Representatives of the United States.

To these articles, a copy of which was delivered to me with the summons, I say, that I have committed no crime or misdemeanor whatsoever for which I am subject to impeachment according to the constitution of the United States. I deny, with a few exceptions, the acts with which I am charged; I shall contend, that all acts admitted to have been done by me, were *legal*; and I deny in every instance, the *improper* intentions, with which the acts charged are alledged to have been done, and in which their supposed criminality altogether consists.

But in charges of so henious a nature, urged by so high an authority, a simple denial is not sufficient. It behoves me, for the legal justification of my conduct, and for the vindication of my character, to meet *each* charge with a full and particular answer; to explain and refute at length every principle urged against me; to state the evidence by which I am to disprove every fact relied on in support of the accusation; and to detail all the facts and arguments on which my defence is to rest. The necessity of an answer embracing all those objects, in cases of impeachment, is obvious; and the *right* to make it, is secured by law and sanctioned by uniform practice.

Such an answer it is my intention to make. It is my purpose to submit the *whole* ground of my defence to the view of this honorable court, of my country, of the world, and of those who are to conduct the prosecution. So will my judges come to the trial with that full knowledge of the whole matter in dispute, which is essential for enabling them to understand and apply the testimony and the arguments; and the honorable managers will be better prepared to refute such parts of my defence, as they may think untenable.

But in a case of this kind, where the accusation embraces so great a

variety of charges, of principles, and of facts, it is manifest, that for preparing such an answer as I have a right to make, and as my duty to myself, my family, my friends and my country requires at my hands, a considerable time must be necessary.

Many of the principles involved in this impeachment are very important, not only to me, but to the liberties of every American citizen, and to the cause of free government in general. These principles ought to be maturely considered, and clearly explained. They present a wide field of legal investigation many of them require laborious and extensive research, and althongh some of them have accompanied the prosecution from its commencement, and have thus been for a considerable time subjected to my consideration, some, on the other hand, have been very recently introduced.

Of this description is the principle, whereon the 5th and 6th articles rest, relative to the extent in which the courts of the United States are to be governed, not only in their *decisions*, but in their *proceedings* by the state laws. A principle which was not brought into view until a few weeks ago, and the explanation of which will require a careful consideration of the conduct and proceedings of the supreme and circuit courts of the United States, from the first establishment of our federal system.

The same articles involve the construction of two state laws of Virginia, which I am charged with having infringed in the trial of Callender, which were not mentioned on the trial, or during any of the introductory proceedings, and of which I never heard until these articles were reported a few weeks ago. It is manifest that in order to fix the true coustruction of these laws, about which professional men have differed in opinion, recourse must be had to the decisions of the courts of that state as explained by their records ; or in case those should be silent, to the recollection and opinion of professional men accustomed to preside or attend in the courts where those laws are enforced. It is manifest that such an investigation cannot be accomplished in a short time.

The facts on which this prosecution rests, except the last article, are alledged to have taken place more than four years ago ; some of them at Philadelphia, some at Wilmington, in the state of Delaware, and some at Richmond, in Virginia.—These facts are very numerous, and the greater part of them are of such a nature, as to depend for their criminality or innocence, on minute circumstances, or slight shades of testimony, and often on the different manner in which the same circumstances may affect different spectators, all equally disposed to represent truly what they observed. The most material facts are alledged to have happened in Richmond and Philadelphia. In the former of these places I am an utter stranger having never been there but once, and in the latter I know personally but very few individuals. These circumstances render it difficult for me to ascertain the persons who witnessed the various transactions in question, and are able after this lapse of time, to give accurate testimony concerning them ; and this difficulty is very much increased, by the distance of those places from that of my residence. I assure the honourable court, that from the moment when this prosecution assumed a serious appearance and a definitive form, at the last session of congress, I have turned my attention to the subject

of my defence and my answer, and have exerted myself in finding out and procuring the requisite testimony; but the difficulties which I have stated, added to my ill state of health during a great part of the last year, have prevented me from making such progress, as to afford me the hope of being able to obtain the object in a very short time, I have done much, but much, very much, remains to be done, even in those parts of the prosecution where I had some notice by the proceedings of last session. In those very material parts which have originated during the present session, every thing is still to be done.

It may perhaps be thought, that although these preparations might be necessary for the trial, they are not so for the answer. But such an opinion I trust, would on examination be found erroneous.

The answer, in cases of impeachment, must disclose the whole defence, and the defence must be confined to the matters stated in the answer: otherwise the prosecutors might be surprised at the trial, by objections, which with previous notice, it would be in their power to refute or explain. The accused therefore, before he puts in his answer, ought to have time sufficient for making himself thoroughly master of his defence, of the grounds on which it rests, and of the facts and evidence by which it is to be supported. He ought to be completely prepared for the trial; between which and the answer no delay need to take place, except such as may be necessary for convening the witnesses.

In so material a part of his preparation for defence, as the drawing up of his answer, it will not, I presume, be denied that he ought to have an opportunity of obtaining the best professional assistance which it may be in his power to procure. This assistance is rendered peculiarly necessary to me, by the very precarious state of my health; which affords me, at this season of the year especially, but short and uncertain intervals of fitness for mental or bodily exertion. Should my answer be required in a short time, I have no reason to suppose that I shall be able to obtain such assistance of this kind as I so much need, and as probably, I shall otherwise have in my power. Professional gentlemen, engaged extensively in business, are at all times too liable to interruption, and too much occupied to devote themselves exclusively to an affair of this nature, so as to complete it within a short period; and at this season of the year, they are for the most part particularly and indispensably engaged.

These reasons in favor of a liberal allowance of time for preparing the answer, derives great additional force from one further consideration which I hope that I may without impropriety present to the view of this honorable court. Reputation ought to be more dear to every man, and is more dear to me than the honors or the emoluments of office. In cases of impeachment, the facts which appear, the explanations which are given, and the arguments which are urged at the trial, are sometimes wholly omitted in the statements given to the public, and often misrepresented, or stated too indistinctly to be generally understood. It is to the answer that the world must look, for the justification of the accused. It is by his answer alone, that he can furnish a clear, concise and authentic explanation of his conduct and his motives, supported by such statement of his proofs, as can be extensively read, clearly understood, and easily remembered. He may therefore claim

from justice, and expect from the high dignity and responsible character of this honorable tribunal, such time for preparing this very important document, as may enable him to bestow on it all the care and labor which it requires, and to give it all the force of which it may be susceptible.

In stating these considerations, Mr. President, in support of a request for a continuance of this case, I disclaim all intention of affected delay. Feeling a consciousness of my integrity, and a just pride of character, which place me far above the fear of events, I am anxious to meet this accusation, and I rejoice in an opportunity of refuting it. I know that my conduct, though liable to a full portion of human error, has at all times been free from intentional impropriety. I know that in all the instances selected as the grounds of accusation, I have discharged my official duties with a sacred and inviolate regard to my oath, my character, the laws of my country, and the rights of my fellow citizens. I know that I can prove my innocence as to all the matters alledged against me. And acrimonious as are the terms in which many of the accusations are conceived; harsh and opprobious as are the epithets wherewith it has been thought proper to assail my name and character, by those who were "puling in their nurse's arms," whilst I was contributing my utmost aid to lay the ground work of American liberty; I yet thank my accusers, whose functions as members of the government of my country I highly respect, for having at length put their charges into a definite form, susceptible of refutation; and for having thereby afforded me an opportunity of vindicating my innocence, in the face of this honourable court, of my country, and of the world.

But this vindication, situated as I am, and as this case is, cannot be the work of a few weeks. Much time has been employed in preparing the accusation; less will be required for the defence; but a short time will not suffice. I am far from presuming to prescribe to this honorable court, whose sense of justice, and disposition to grant every proper indulgence, I cannot doubt—But it may perhaps be not improper to suggest, that by the first day of next session, the answer could be prepared and put in; and that the trial might then take place as soon afterwards as the witnesses could be collected. I declare that it will be impossible for me to prepare my answer in such time as to commence the trial during this session with any prospect of bringing it to a close before the session must end; and were I to omit that full answer which I wish to give, it would be impossible for me, in the course of this session, (only two months of which now remain) to ascertain fully all the facts necessary for my defence; to find out and bring to this place the witnesses and written testimony; or to make arrangements relative to that assistance of counsel which my case requires, my age and infirmities render essential, and a longer time would enable me to procure.

I hope, Mr. President, I may be permitted to observe, that my *private* and *professional* reputation for probity and honor has never been called in question. I have sustained a high judicial character for about sixteen years, and during the first six, I presided at the trial of more criminals than any other judge within the United States. During this whole period of time, my *official* conduct has never been arraigned, except, only in the trials of Cooper, Fries, and Callender, about four years ago. For the truth of these assertions, I

appeal to all who know me; and particularly to the two honorable Senators from Maryland.

In respect to the present prosecution I will make but one remark—That I am impeached for giving on the trial of Callender, several judicial opinions, in which Judge Griffin, my associate, concurred; my opinions are held to be criminal, or that they flowed from partiality, and an intention to oppress Callender; but the *same* opinions given by my associate, have been considered perfectly innocent.

I have now only to solicit this honorable court to allow me until the first day of next session to put in my answer, and to prepare for my trial; and I submit myself as to the further proceedings in this case, to the discretion of this honorable court, in whose integrity, impartiality and independence, I repose the highest confidence: I will not for a moment believe that the spirit of party can ever enter and pollute these walls, or that popular prejudice or political motives will be harbored in the bosom of any member of this honorable body.

On the contrary, I hope and expect that all its decisions will be governed by the immutable principles of justice, and a sacred regard to the constitution and the law of the land, which every member of this court is bound by duty, and the obligations of a Christian judge, to support and observe."

The *President* then desired Mr. Chase if he had any motion to make, to reduce it to writing and hand it to the secretary.

Mr. *Chase* hereupon stated his motion in writing, which was that he might be allowed until the first day of the next session to put in his answer and prepare himself with counsel for his trial. Which was read by the secretary.

The President then informed him that the Senate would deliberate on his motion, and that the court would be opened to-morrow at 12 o'clock.

The Senate immediately, on the invitation of the President, left the senate Chamber, and proceeded to a private committee room.

During the whole of these proceedings, neither the managers or House of Representatives were present.

THURSDAY, January 3.

The Secretary administered to the President the following oath. "You do solemnly swear that in all things appertaining to the trial of the impeachment of Samuel Chase, you will do impartial justice according to the constitution and laws of the United States:"

The like oath was administered by the President to 27 of the members present, and three others made solemn affirmation to the same effect.

The President laid before the Senate a letter from Samuel Chase, inclosing an affidavit sworn before Mr. Justice Hamilton, assigning various facts and reasons for being allowed further time to give in his answer.

[*The following is the affidavit of Judge Chase.*]

CITY OF WASHINGTON, *ss.*

Samuel Chase made oath on the Holy Evangelists of Almighty God,

that it is not in his power to obtain information respecting the facts alledged in the articles of impeachment to have taken place in the city of Philadelphia, in the trial of John Fries; or of the facts alledged to have taken place in the city of Richmond, in the trial of James T. Callender, in time to prepare and put in his answer, and to proceed to trial, with any probability that the same could be finished on or before the fifth day of March next. And further, that it is not in his power to procure information of the names of the witnesses, whom he thinks it may be proper and necessary for him to summon, in time to obtain their attendance, if his answer could be prepared in time sufficient for the said trial, before the said fifth day of March next: And the said Samuel Chase further made oath, that he believes it will not be in his power to obtain the advice of counsel, to prepare his answer, and to give him their assistance on the trial, which he thinks necessary, if the said trial should take place during the present session of Congress—and that he believes if he had at this time, full information of facts and of the witnesses proper for him to summon, and if he had also the assistance of counsel, that he could not compare the answer he thinks he ought to put in, and be ready for his trial, within the space of four or five weeks from this time. And further, that his application to the honorable the Senate, for time to obtain information of facts, in order to prepare his answer, and for time to procure the necessary witnesses, and to prepare for his defence in the trial and to obtain the advice and assistance of counsel, is not made for the purpose of delay, but only for the purpose of obtaining a full hearing of the articles of impeachment against him, in their real merits. SAMUEL CHASE.

Mr. Bradley moved the Senate to come to the following resolution.

Ordered, That Samuel Chase, one of the associate justices of the supreme court of the United States, do file his answer to the articles of impeachment exhibited against him, with the secretary of the Senate, on or before the day of

Mr. Giles moved to strike out all the words after the word *ordered*, and insert in lieu thereof the following: "That the day of shall be the day for receiving the answer, and proceeding on the trial of the impeachment of Samuel Chase."

Mr. Hillhouse moved a division of the question, taking it first on striking out.

Mr. Giles asked if the whole was not one motion.

The President declared that any member of the court had the right of requiring a division of a question where it was susceptible of a division, and he conceived the amendment proposed was capable of being divided.

The question was then taken on striking out by calling over the names of the members, and there appeared Ayes 20—Noes 10—So the words were stricken out.

The question was next taken in like manner upon inserting the words moved by Mr. Giles, and was carried—Ayes 22—Noes 8.

Mr. Tracy moved to fill up the blank with the first Monday in cember next.

Mr. Breckenridge moved to fill up with the 4th February next.

The President said the first question would be on the most distant day, viz. the first Monday in December next.

On this question there appeared 12 Ayes and 18 Noes. So the motion was lost.

The President then put the question on the 4th day of February next, which was carried in the affirmative—21 Yeas and 9 Noes.

The question on the order, as amended, was then put and carried —Ayes 21—Noes 9.

The Secretary was directed by the President to deliver a copy of this order to the House of Repre-entatives and another copy to Samuel Chase.

After enquiry by the President whether any gentleman had any thing further to offer, the Senate withdrew to a private chamber.

TRIAL

OF THE

HON. SAMUEL CHASE,

Continued.

Monday, Feb. 4, 1805.

THE Senate, by their secretary, made a communication to the house of representatives, that they were ready to proceed upon the trial in the senate chamber: and thereupon proceeded to their stations, preceded by their sergeant at arms—and the president (Mr. Burr) being seated.

The members of the house of representatives, preceded by their speaker and the managers, having entered the court and taken their stations—on the front seat Mr. Rodney, Mr. Nicholson, Mr. Clark and Mr. Randolph; on the second row, Mr. Campbell, Mr. Boyle, and Mr. Early. Chairs were provided on the left of the managers, for the speaker and clerk of the house of representatives.

The President then directed the crier to open the court—which was done in the old Norman style;—OYEZ!—OYEZ!—OYEZ! all manner of persons, &c.

The President then directed Samuel Chase to be called—which was done—and he appeared.

On Judge Chase's advancing to the bar, followed by his counsel, the president addressed him, informing him that the time which the senate had granted to prepare for his defence was now expired, and he desired to know if he was prepared to answer to the charges preferred against him by the house of representatives.

The President then informed him, that seats were provided for himself and counsel. The judge named them, Messrs. Luther Martin and R. G. Harper of Baltimore, and Joseph Hopkinson; and then seated himself. His seat was separated by the bar, from Mr. Rodney, who sat on the other side—on the judge's right were in succession, Mr. Martin, Mr. Hopkinson, and Mr. Harper.

Judge Chase then observed that the time allowed him for putting in his answer was not as much as he wished, and that his answer was not so complete as he had desired—he then produced his pleas,* and, having read the caption and introductory part, he then handed it to Mr. Harper, who continued to read 'till two o'clock; when Mr. Hopkinson continued the reading to four o'clock; then Mr. Harper continued for about half an hour; the Judge read the closing part, which was a solemn religious appeal.

After a few errors made in transcribing were corrected.

Mr Randolph (chairman of the managers) said—am I to consider this plea and answer of the respondent as final, or does he mean to go further?

The President. I understood that this answer, now given in, is that by which he means to abide.

Mr. Randolph.—That escaped my hearing before. I now, on behalf of the managers, require of the senate time to prepare a replication to this plea, and a copy thereof.

The President—Upon this request the senate will deliberate, and duly advise the house of representatives.

* See end of the Volume.

Mr. J. Randolph, the leading manager, requested that the witnesses, on the part of the prosecution might be called, to ascertain who were present.

They were accordingly called, to the number of twenty-four, as follow :—those who answered are marked *(p)*—and those absent *(a)*

Alexander James Dallas,	*p.*
William Lewis,	*p.*
William S. Biddle,	*p.*
Edward Tilghman,	*p.*
George Read,	*p.*
James Lea,	*a.*
John Crow,	*a.*
Risdon Bishop.	*a.*
John Montgomery,	*p.*
John Stephen,	*p.*
Aquila Hall,	*a.*
Philip Stewart,	*a.*
John Thompson Mason,	*p.*
Samuel H. Smith,	*p.*
Thomas Hall,	*a.*
John Taylor,	*p.*
George Hay,	*p.*
Philip N. Nicholas,	*a.*
William Wirt,	*p.*
John Harvie,	*a.*
Merewether Jones,	*a.*
John Heath,	*p.*
James Pleasants,	*a.*

Fourteen being present, and ten absent. Of those marked absent, we understand that Philip N. Nicholas is in the city.

Mr. J. Randolph observed, that various considerations, which it was unnecessary to detail, induced him, on behalf of the managers, to move a postponement of the trial 'till to-morrow, when they hoped to be prepared to proceed therewith.

Mr. Harper said, that on behalf of Judge Chase, he would not object to the motion.

The *President* informed the managers, that the Senate acceded to their request, and added, that the Senate would attend to-morrow at twelve o'clock, for the purpose of proceeding with the trial.

At the request of Mr. Harper, the witnesses on the part of Judge Chase were called over, to the number of forty-one, as follow; those present are marked *(p)*—and those absent *(a)*.

Witnesses summoned by Judge Chase.

William Marshall,	*a.*
David M. Randolph,	*p.*
Edmund Randolph,	*a.*
John A. Chevalier	*p.*
Robert Gamble,	*a.*
John Marshall,	*p.*
John Basset,	*p.*
Cyrus Griffin,	*sick.*
David Robertson,	*p.*
John C. Barret,	*dead.*
John Hopkins,	*not found.*
Philip Gooch,	*not found.*
William Minor,	*not found.*
James Winchester,	*p.*
Philip Moore,	*a.*
Cornelius Comegys,	*a.*
John Purviance,	*p.*
Thomas Chase,	*p.*
John Stewart,	*a.*
William Rawle,	*p.*
Gunning Bedford,	*p.*
Nicholas Vandyke,	*p.*
Archibald Hamilton,	*p.*
S. P. Moore,	*p.*
William C. Frazier,	*p.*
Edward Tilghman,	*p.*
Wm. Meredith,	*p.*
Jared Ingersoll,	*p.*
Samuel Wheeler,	*not found.*
Samuel Ewing,	*p.*
Walter Dorsey,	*p.*
James P. Boyd,	*p.*
Nicholas Brice,	*p.*
Wm. Mc Mechen	*p.*
William H. Winder,	*p.*
William Gwynn,	*p.*
William J. Govane,	*p.*
Edward J. Coale,	*a.*
John Hall, jun.	*p.*
Thomas Carpenter,	*p.*

Twenty-seven being present, and thirteen absent, of those marked absent, Ed. J. Coale is in the city.

Whereupon the court rose.

SATURDAY, February 9.

The Court being called, the Managers attended.

Judge Chase with his counsel, Messrs. Martin, Harper, Hopkinson and Key, appeared and took their seats.

The President then informed the Managers that the court were ready to hear them on the part of the prosecution—Mr. RANDOLPH rose and spoke as follows:—

MR. PRESIDENT,

It becomes my duty to open the case on the part of the prosecution. From this duty, however inadequate I might be at any time to discharge it, and especially at the present, both on account of the shortness of time which we have had to answer the lengthy reply of the respondent, and of personal indisposition, I shall not shrink. When I speak of the shortness of the time allowed us to reply to the answer of the respondent, I hope I shall not be understood as casting any imputation upon this honorable court, for expressing a wish that the trial may be postponed. Sensible I am, that this court would allow us longer time, but a desire for the furtherance of justice, added to the impregnable ground on which the managers stand, induce them to be ready on the part of the prosecution.

The managers are in this instance to establish the guilt of one of the judges of the supreme court—Of a man capable of being one of the ornaments of his country—and who if he had made a proper use of his talents would have done as much good for his country, as he has inflicted wounds upon it by his misconduct. The arraignment of a man of such talents before this tribunal, is one of the saddest spectacles ever presented to the view of any people.—Base indeed must be his heart who could triumph over such a scene.

The first charge with which the respondent is impeached, is relative to his conduct upon the trial of John Fries for treason.

[Here Mr. Randolph read the first article of impeachment.]

The answer of the respondent to this charge is by evasive insinuations and misrepresentations of facts. He attempts to shew that the opinion which he delivered in the case of Fries, upon the law, was the law laid down by his predecessors, in the same court, and once upon the same case. This is an attempt to wrest the charge from the true point on which it stands, and to place it upon another. It is not on account of the illegality of the opinion which the respondent gave that he is impeached, but for the time when he delivered it, and the motives by which he was governed. The charge against him is, that he delivered an opinion in writing, tending to prejudice the minds of the jury against John Fries the prisoner, before the case had been argued by the counsel. If the managers were to be governed by their own sense of propriety, and not by their duty to those by whom they are employed, they might with safety, in my opinion, rest the case upon the concessions of the respondent himself. The respondent acknowledges in his answer, that he did deliver an opinion on the law, tending to prejudice the minds of the jury against John Fries the prisoner, before the counsel had been heard in his defence. This may be seen by a reference to the answer of the respondent, a part of which I must beg the favor of one of those associated with me to read.

Mr. Clark here read a passage of the answer.

Our object is to prove that the opinion was delivered with an intention to prejudice the minds of the jury against the prisoner—and that the respondent did restrict the counsel in their attempt to cite English authorities which they considered apposite, and also the statutes of the United States and did debar them of their constitutional privilege to address the jury upon the law as well as the fact. These are facts which we are able to prove by the most respectable evidence. But the respondent assigns as a reason for his delivering his opinion on the law at the time he did, that the law had been settled by his predecessors. What does this prove? That the respondent endeavored to wrest from the counsel privileges which none of his predecessors conceived themselves authorised to do, to wit, that of addressing the jury on the law as well as the fact. If as the respondent states, the law was settled twice, after solemn argument, it is an evidence

that his predecessors never attempted to debar the counsel from arguing before the jury as to the law. The learned judges who decide the law in those cases, and to whom the respondent has appealed as authority, delivered their opinions posterior to the argument by the counsel and not anterior like the respondent. I repeat again, that it is not for the giving the opinion, that the respondent is charged, but for the manner of giving it. It is for having a copy of a written opinion made out for the jury, previous to their hearing argument, and thereby prejudicing their minds against the prisoner. The respondent has also admitted that the counsel for Fries had rested their case altogether upon the law, conscious that the facts could be proven. For this reason they ought not to have been controlled in their defence. If they believed that the law was in favor of the prisoner, they had a right to address the jury upon that as well as upon the facts, and in debarring them from it, the respondent wrested from the prisoner a constitutional right, that of being heard by counsel. I must be allowed to take what I conceive to be a strong distinction—that there is a material difference between at judges' giving a naked definition of the crime of high treason, and an opinion upon certain overt acts charged in an indictment and applied to the particular case before him. The managers do not deny—the counsel for Fries did not deny the right of the respondent to deliver his opinion to the jury upon the law respecting high treason, but the difference which I have taken appears evident, and the respondent had no right to deliver a written opinion to the jury concerning the particular case, and before solemn argument by counsel.—To illustrate this point permit me to state a similar case. It will not be pretended that the crime of high treason is better defined, than the crime of murder. The latter is defined to be a killing with malice prepense. But although the definition is so well known was there ever a judge before the respondent daring enough to tell the jury that the overt acts charged in the indictment, if proved amounted to murder and that they must find the prisoner guilty; I believe not. There is a very wide distinction between the conduct of a judge who delivers an opinion to the jury upon the law, after solemn argument, and that of the respondent who prejudged the case. I believe there never has been an instance where counsel have been stopped by the court, when they attempted to prove to the jury that the facts which a prisoner had committed did not amount to murder. The conduct of the respondent in preventing the counsel from addressing the jury upon the law, and delivering a written opinion, before argument, was entirely novel to the usages of our country. The respondent aware that the managers were prepared to prove what is charged against him, has in his answer admitted a part of the charge, but a part of it he has denied. This we are prepared to prove by the most respectable testimony. We are prepared to prove that the respondent debarred the prisoner of his constitutional right of adddressing the jury by his counsel upon the law. This the respondent has in a manner admitted in his answer, for he says that he informed the counsel for Fries that if they conceived that the court were wrong in their opinion as to the law they might address themselves to the court. What would be said if a judge in a case where a person was tried for murder, if he were to inform the counsel for the prisoner that they should not address the jury upon the law; that they should not attempt to prove to the jury that the facts committed, did not amount to murder; but that on that subject, they must address themselves to the court! He would be deservedly censured by every man, and would be considered as unworthy of sitting on the bench of justice—and yet the conduct of the respondent was not dissimilar to this. The jury has a right in all criminal cases to find a general verdict, and to judge of the law, and of course had a right to hear argument on it. The acts of Congress which the counsel for Fries, intended to have read to the jury, went in their opinion, to shew that the crime which Fries had committed, was less than treason, and made punishable by fine and imprisonment—and yet the same judge which delivered a prejudicated opinion, prevented these statues, which were the law of the land, from being read. Not only were the counsel debarred from citing common

authorities, and the decisions of courts of justice in another country, but even from the laws of the land: although they considered that they were material to the defence of the prisoner.

I must be again permitted to repeat, that it is not for the incorrectness of the opinion delivered by the respondent in the case of Fries, that he stands charged, but for the time when he delivered it, and his motives for doing it. The Managers will not undertake to examine the soundness of the opinion,—they have nothing to do with that—but the manner of delivering it, was a departure from all precedents, and what I believe, is novel in all our courts of justice.

I will now proceed to the second article of impeachment. It is, that the respondent overruled the objection of John Basset, who wished to be excused from serving as a juror on the trial of Callender, upon the ground that the opinion of the juror must have been delivered as well as formed and that upon the words charged in the indictment. In the ninth page of the answer of the respondent, it will be seen, that a new trial was granted to Fries, upon the ground that one of the jurors after he had been summoned, but before he was sworn, had used expressions hostile to the prisoner. By recurring to the answer of the respondent, it will be found that the opinion which he gave in the trial of Fries, was dissimilar to the one held to be correct in the case of Callender. In the case of Fries the jury before they were sworn, were asked whether they had formed or delivered any opinion, hostile to the prisoner, or that he ought to be punished. The question was in the disjunctive, not whether he had formed and delivered an opinion, but whether he had formed or delivered an opinion. But in the case of Callender a different conduct was pursued, and a juror was not to be excused from serving unless he had delivered as well as formed an opinion; Basset could never have seen the indictment, and therefore according to the opinion given by the respondent, could not be set aside, even although he had a personal and avowed enemity to the defendant. It was perfectly immaterial what Basset's opinion, as to the guilt of the defendant, was, because the only question which was suffered to be put to him, was one, that he was obliged to answer in the negative, to wit, whether he had formed and delivered an opinion upon an indictment which he could not have seen. The respondent, has attempted to justify his conduct in this case, well knowing that the facts can all be proved, and contends that a juror's opinion must be formed and delivered upon the indictment, and not on the subject matter to be tried, to disqualify him from serving. In the case of Callender the subject matter to be tried, was, whether "The Prospect Before Us," was a libel. If the Juror had formed an opinion upon the book which was the matter in issue, that it was libellous, and also opinions hostile to the author, he was not a proper person to pass judgment between the defendant and his country. If Mr. Basset had formed an opinion that the "Prospect Before Us" was a false, scandalous, and malicious libel, and came under the provisions of the act called the sedition act, he was not a person to serve upon the jury. Upon the ground taken by the respondent a personal enemy of any defendant might be taken upon a jury, and the defendant could not object to him, because he could not have formed and delivered an opinion upon an indictment which he had never seen. The third article of impeachment, is for rejecting the testimony of John Taylor, whom Callender believed to be a material witness, upon the ground, that, he could not prove all the charges in the indictment. Had this been the case, and John Taylor could only have proved a part of the charges, yet the conduct of the respondent must appear novel and unprecedented to every person. But at the time when the evidence of John Taylor was rejected, the respondent as well as the counsel for the traverser, were ignorant of what he could prove. But it was rejected upon the ground that he was unable to prove all the charges in the indictment to be true. The charge extracted from "The Prospect Before Us!" a book, which with all its celebrity, I never saw until yesterday, was in these words (speaking of Mr. Adams) "He is a professed aristocrat; and has proved faithful and ser-

viceable to the British interest." The charge was contained in two distinct sentences. The respondent, says, that taken separately, they meant nothing; taken together, they meant a great deal. Yet the evidence of John Taylor was refused, although, he was expected to prove the whole charge, according to the meaning of the defendant when he wrote it. He was expected to prove that Mr. Adams had been useful to the British interest in the manner meant by the author of the "Prospect Before Us." I will ask, this honorable court, whether it is proper for evidence to be rejected, because incapable of proving all the facts in the case? May not a witness be material, although he can only establish a particular point? As if a fact were proven by one witness, would it be proper to admit testimony to strengthen that evidence although the person knew nothing of the facts: as for instance, to prove that he saw the parties together on that day. Suppose two witnesses were adduced to prove facts, and neither could prove all, according to the decisions of the respondent neither could be admitted to give evidence. The respondent in his answer, says, that the court have a right to compel counsel to reduce the questions which they meant to propound to their witness to writing, and that it has frequently been done. I do not intend to set up my judgment upon legal questions, in opposition to the respondent's—but I can say without hesitation that it is not the practice in the state in which the case was tried, nor has counsel in Virginia, either before, or since the case of Callender, been compelled to reduce to writing any questions which they wished to propound to their witnesses and to submit those questions to the inspection of the Court. But the respondent has set up this curious defence That he went with a determination to convict and punish Callender, and therefore it was perfectly immaterial whether he could prove a part of the charges to be true or not, if he could not prove the whole, and if but one of the twenty charges could be fixed upon him, he would be perfectly in the power of the Court. What was this but prejudging the case, and a determination of the respondent to procure the conviction of the defendant. But it was impossible for the court to know what John Taylor would prove. For ought they knew his evidence might have gone to the whole case, and produced from the jury a verdict of acquittal for the traverser. With respect to the counsel's having been compelled to reduce their questions to writing and submit them to the inspection of the court, it is believed by the Managers, to be a course of procedure unusual in courts of justice. I recollect to have been present at the famous trial of Logwood, where the Chief Justice of the U. States presided. It must be conceded that the U. States were as much interested in the conviction of so notorious an offender, as in that of any libeller whatever. Although evidence of the most questionable sort was brought forward on behalf of Logwood, nothing of that kind, took place.—The witnesses were all sworn in chief, and the weight of their testimony was left to the jury. The respondent also refused to postpone the trial of Callender, although an affidavit was filed stating the absence of material witnesses. The ground taken by the respondent in justification of this, is, that the witnesses lived in so dispersed a situation, that it would have been almost impossible to procure their attendance at the next court—this was a reason which ought to have operated forcibly in favor of a postponement of the trial, and goes to the conviction of the respondent. With regard to the rude and contemptuous expressions used by the respondent to the counsel for Callender, and the unusual manner in which he conducted himself, I will only refer the court to the testimony which will be offered in this case. But perhaps I shall be told that although such conduct is highly improper and unbecoming in a Judge, yet it is not an indictable offence, and therefore not sufficient cause for a removal from office. In answer to this, I will beg leave to observe, that this is not a case to be determined according to common law, but by the common sense, and common opinion of the world upon it. I do not know whether it would be deemed an indictable offence for a Judge to appear upon the Bench of Justice in a state of total intoxication and to use profane and obscene language, yet I presume it will not be denied that a Judge convicted of

these offences can be removed by this Honorable Court.

The fifth article of impeachment, charges the respondent with having awarded a capias against the body of Callendar, contrary to the law of Virginia, which was recognised by the act of congress, passed in the year '89 for the establishment of the judicial system of the United States, as the rules of decision in the Federal courts. The defence stated by the respondent, embraces two points—the one that the law of Virginia was passed posterior to the acts of congress and therefore the latter could not have had reference to it; and it was not a rule of decision. It will be necessary to inform some of this court that the acts of Virginia had by the authority undergone an amendment and revision, and the acts thus revised were published under the title of the revised code of the laws of Virginia in the year 1792, of course part of them bear date later than they were actually passed. The act in question did pass in the year '88, was anterior to the act of congress; and being law at the time the latter passed, it became a rule of decision for the Federal courts held in the state of Virginia.

(Mr. Randolph here read the law of Virginia.)

But the respondent states his ignorance of the law, and also that he did comply with it by issuing other proper process. We are prepared to prove that the other proper process mentioned in the law, has always been construed to mean a notice, to the party charged, to appear at the next court, and answer to the charges against him. But it has been said that this would be a notice to the party to abscond, and therefore avoid a punishment.

In cases not capital, it would be much better for a state, in my opinion, that the offender should go away into voluntary punishment, than to punish him, and suffer him to remain in the state.—It has never been the practice of Virginia, for an offence less than capital, to commit the offender to close custody. A capias has never been deemed the proper process—and that awarded against the body of Callender was not warranted by any law of Virginia, which was the rule of decision in that case. But the respondent says, that the counsel for the accused forbore to mention this law, and that he could not have been presumed to have known it. The counsel for the accused did cite this very act, not the section which relates to the point under consideration, but in support of their motion for a continuance of the trial, and of the right of the jury to assess the fine. They were told by the respondent that the court were not bound to notice that law, and that although it might be law in Virginia, when applied to their local regulations, but as applied to the courts of the United States, the construction was a wild one. Would it not then have been deemed folly in the extreme for the counsel for the accused to have brought the same act in order to support any other position which they might take. We are prepared to prove that unless this decision had been made by the court, that they were not bound to notice the law, that the law would have been cited.

But the respondent takes shelter under this doctrine, that the provisions of the act of congress can relate only to state regulations, and not to the statutes of the United States, which he says are not, cases at common law. We are prepared and I trust shall be able to shew, that the words "trials at common law" were only used to contradistinguish them from the civil and maratime law.

I will pass over the seventh article and leave it upon the ground upon which it has been placed by the respondent in his answer.

On the eighth article I will observe, that the perversion of the bench of justice to the hustings of an election, was a thing totally variant from, and has no connection with, the right of speech which the respondent enjoys in his individual capacity. He has no right in his judicial capacity, to prevert the bench of justice into the cheatre of his political declamations. But we shall be told that in all those acts with which the respondent

stands charged, that he was associated with other judges, who concurred in opinion with him, and were therefore equally guilty with the respondent.

The court will recollect the high standing which the respondent has with every person for his legal learning and abilities. This court will take all the acts together, and will observe, that in all of them, the repondent appeared to be the sole actor. With talents so conspicuous, and a disposition so irritable, he has been associated in the four several courts where he presided, and the acts for which he is impeached, were committed with men perhaps of timid minds, and with talents very far inferior to those of the respondent, that they were overawed by him, and were not culpable as the respondent. Wherever we behold the respondent sitting in his judicial capacity, we find the counsel extremely irritable and contumelious; and yet we behold the other judges of the United States, holding courts in the same places, and associated with the same district judges as the respondent, and nothing of this kind appears. Contumacy is only found to exist in those courts where the respondent presides. Great distinction therefore exists between the respondent and these judges who have been upon the bench with him when these violations of law and justice took place. There is a great distinction between a judge anxious for the punishment of men who have violated the laws, and a judge anxious for the punishment of those who violate a particular law. I could, if permitted, turn to a judge who has not been surpassed in this country as a terror to evil doers—an authority that differed with the respondent in his construction of the law relative to treason—a man second to none for his punishment of notorious offenders, for his regard to the laws, and for his humanity. I will beg leave to read a passage from a work of his. [*Mr. Randolph here reads a passage from Tucker's Blackstone.*]

I have endeavored, Mr. President, in a manner very lame, to discharge the duty incumbent on me, and to shew the grounds on which we mean to rely for the conviction of the respondent. Such, however, is the case that it does not rest on so weak a ground as my arguments. I believe we shall be able to exhibit to this honourable court, a tissue of judicial proceedings never before exhibited in the annals of our country. The respondent, in his answer, has appealed to the Supreme Searcher of hearts, at the last day, for the rectitude of his conduct. When such an appeal is made, I feel for the respondent, but I feel a great relief upon considering that the blood of John Fries, an innocent and oppressed man, will not rise in judgment against him. But for the timely extension of that provision of the constitution, which gives the president the power of granting pardon, the cries of the widow and the tears of the orphan would have cried aloud for justice against him at the throne of grace.—And when at the last day all hearts were laid open, he would have been obliged to accuse himself, and to attest that in a manner novel and unprecedented, he had procured the conviction of a poor ignorant illiterate German, and sent him without remorse into eternity. But the then president of the United States has saved the respondent from answering for blood by granting a pardon to Fries, and by this act, obliterated the remembrance of a number of his errors from my mind, for mercy like charity, covereth a multitude of sins; and the pure ermin of justice was not suffered to be dyed with the blood of John Fries.

Mr. Randolph here ended his speech, and the examination of witnesses commenced and continued till near 4 o'clock, when the court adjourned to Monday 12 o'clock.

Evidence on the part of the United States.

WILLIAM LEWIS affirmed,

Mr. Nicholson—Please state the transactions which took place relative to the trial of Fries.

Mr. Lewis—Mr. Dallas, Mr. Ewing and myself were counsel for Fries at his first trial. It was conducted in the usual

manner, and we were allowed to use every means necessary to acquit him. The trial was before judges Iredell and Peters. He was convicted, and a new trial was granted, upon the ground that one of the jurors, after he had been summoned, but before he was sworn, had made use of expressions, hostile to Fries, and that he ought to be punished. This took place in the months of April and May in the year 1799. At the October sessions following, Mr. Dallas and myself attended at Norristown in expectation that the trial would come on, but it did not, owing to circumstances not necessary to be mentioned at this time.—At the April term the proceedings on the first trial were stated by the district attorney, and a new indictment found. At this term Judge Chase presided and was assisted by judge Peters. On the morning of a certain day which I do not recollect precisely, when I entered the court, the judges were on the bench, whether the prisoner was then at the bar I do not recollect, but if he was not, he was soon placed there. The list of the petit jury were called over and many of them attended.

I will now relate as well as I can recollect the circumstances which took place relative to the trial, first premising, that altho' my memory is very good for a short time, yet after a lapse of time it is not very tenacious. I cannot therefore tell what part of the transactions took place on the first or on the second day, nor can I pretend to state the conversation literally, but I am certain I shall do it in substance. Judge Chase observed, that he had understood that at the former trial or trials (I do not recollect which) there had been a great waste of time by the counsel in making long speeches and in reading common law determinations relative to the doctrine of treason, and also English authorities both before and since their revolution, and also in reading several acts of Congress concerning offences less than treason, particularly the act commonly called the sedition law. He also mentioned that in order to remedy this, that he or they, (I do not recollect which) had made up an opinion on the law which he intended to deliver to the jury, and in order that the counsel on both sides might govern themselves accordingly, he or they had directed Mr. Caldwell, clerk of the court to make out three copies, one of them to be delivered to the District attorney, one to the counsel for the prisoner, and a third to be delivered to the jury as soon as the cause should have been either opened or gone through on the part of the prosecution. Mr. Dallas had not at that time come into court, and nothing had been said on the part of the prisoner.—About this time the judge threw down one or more papers to the clerk of the court, but whether I saw them pass from the hand of one to that of the other, I know not. The clerk handed me the paper which was designed for the prisoner's counsel—if I took hold of it I am certain I did not read it. My impression is that I waved my hand, and used these words, "I will never suffer my hand to be corrupted with a prejudged opinion in any case, much less so in a capital one." If judge Peters made use of any expressions on the first day, I do not recollect it: Judge Chase when speaking of the cases cited from the common law authorities and the statutes of England previous to the revolution, and also of the acts of Congress, said he would not suffer them to be read again. I am sure of the first, and believe the prohibition extended also to the acts of Congress. I know he said that the acts of Congress had no relation to the subject. He also said that they were the judges of the law, and if they did not understand it, they were unworthy of their seats there, and if the prisoner's counsel had any thing to say, in order to shew that they were wrong, they must address themselves to the court and not to the jury. I made some observations on the subject, but I cannot say with precision what they were. I was struck with what had been said, and wished Mr. Dallas in court. I went out of the bar in order to see if I could find some person to send for him, when I saw him come into court. I met him and briefly related what had passed. He came forward and we were both impressed with the idea that as the court had made up their minds, it was not probable that they could be changed,

and that it would be more serviceable to Fries, that we should withdraw from his defence—this we told Fries and earnestly recommended to him to agree to it. He appeared greatly alarmed and extremely agitated and much at a loss what to do—we at the same time told him that if he insisted on it we would proceed in his defence at every hazard and until we were stopped by the court, and that if we proceeded, we should contend for our constitutional privileges, and should address the jury on the law as well as on the fact.—He seemed relieved from the state of alarm in which he was in, and observed that he knew we would do the best for him, and left it entirely with us to proceed or not at our pleasure with his defence. I told him we would call upon him at the jail and converse with him on the subject.—We informed him the court would in all probability offer to assign him other counsel, and desired him to refuse the offer, which I understand he did, although I was not present at the time. It being thus determined that Mr. Dallas and myself should withdraw from the defence of Fries, I went to court the next day in order to inform the court that I was no longer counsel for the prisoner. I began to signify my determination by stating what had taken place the day before.—Both judge Chase and judge Peters manifested a strong disposition that we should proceed with the defence of the prisoner, and also to remove every restriction which had been laid upon us the day before. I was stopped in what I was about to say by judge Chase, who told us to go on in our own way and to address the jury upon the law as well as the fact, if we thought proper, but at the same time observed, that it would be under the direction of the court, and at our own peril, and at the risk of our characters, if we conducted ourselves with impropriety. This had rather a contrary effect upon me than to induce me to proceed with the defence as I was not conscious of having so conducted myself as to render it necessary to be reminded in this manner, that it would be at the risk of my character. Judge Peters observed, that he knew the bar would take the stud, and asked if the court were in an error, would we not suffer it to be corrected. If they had fallen into an error, I wished to keep them in it provided it would save the life of my client.

I mentioned at either this or some other stage of the trial, that it was the constitutional right of the prisoner to have counsel for his defence, and that it was the privilege of the counsel to address the jury upon the law as well as the fact in criminal cases, and that this was a right which would not be surrendered by the bar.—I added that I never had nor never would address a court in a criminal case—in this however I was mistaken, for I recollect since, that I once did it. Judge Peters remarked that the papers were all withdrawn and destroyed. To this I answered, that the court had said that they had made up their minds and had expressed it in the hearing of the jury, which would be injurious to the prisoner, and that therefore I would not proceed in his defence. When Judge Chase had said that we should not read any decisions in England previous to their revolution, he said that we might read those that were made after it. We had not read the decisions at common law to shew that they were applicable to this country, or that the judges in this country were bound by them, but in order to shew that they ought to guard against constructive treason. This was the object for which they had been read before, and for which we intended to use them at that time.—Judge Chase asked, if counsel took it in their heads to read any authority as law which was not law, ought the court to allow them to do it. Finding that Mr. Dallas and myself would not proceed in Fries's defence, judge Chase observed that we should not be able to embarrass the court and that they would proceed without us, and by the blessing of God would render as much justice to the prisoner as if we had proceeded in his defence. The judges both on the second day took pains to induce us to proceed, but we refused, believing, after what had taken place, the life of our client would be saved sooner by his not having counsel, than by any exertion on our part after the opinion delivered by the court.

Mr. Nicholson—You have said Mr. Lewis, that after the first conviction of Fries, a new trial was granted upon the ground that one of the jury had made use of some expressions against the prisoner—what were those expressions?

Mr. Lewis.—I believe they were expressions hostile to the insurgents in general, and to Fries in particular.

Mr. N.—You say that the defence in the first trial was conducted in the usual manner—what do you mean by that?

Mr. L.—We were allowed the utmost latitude in our defence, and to read what we thought proper to the jury, and to address them upon the law as well as the fact.

Mr. N.—You were allowed to read decisions at common law, and also before as well as after the revolution?

Mr. L.—Certainly, Sir.

Mr. N.—And also what statutes of the United States, which you conceived to be applicable?

Mr. L.—We were.—It may be proper to mention that the trial did not go on the day that I declined acting and left the court. On the next day I went to court, but finding that they were proceeding with the trial, I left it immediately, and was not there, during the whole course of the trial. I learned that the court had offered to assign the prisoner new counsel—but that pursuant to our advice, he had refused it;—and that he had been found guilty.

Mr. Randolph.—Have you not been frequently employed in the defence of criminals, and especially for treason—and have you not been a long time at the bar?

Mr. L.—I qualified in the court of common pleas in Pennsylvania in the year 1774, and in the supreme court in the year '75.—During my practice, I believe that I have defended more criminals in comparison to my other practice than any gentleman of the Philadelphia bar—when the British left Philadelphia, although very young at that time, I defended, I believe, 152 persons charged with having committed treason.

Mr. R.—Did you ever during the whole course of your practice see any proceeding in a prosecution similar to the one which took place on the trial of Fries?

Mr. Key objected to this question being answered.

The President requested Mr. Randolph to reduce his question to writing.

While this was doing—Judge Chase observed, that as much illegal testimony had already been given, he should not object to the present question being answered.

Mr. L. The proceeding was entirely novel to me.

Mr. R.—And yet you have been present when a great number of civil cases were pending in the court and for trial?

Mr. L.—Generally speaking, the criminal trials take place in our state, in the court called the court of Oyer and Terminer, and do not interfere with civil trials. In the circuit court of the United States, where a number of criminals have been tried, I do not believe that the circumstance of there being a number of civil cases on the docket, ever had any effect upon criminal cases.

Mr. William Lewis—cross examined by Mr. Harper.

Q.—Did you not appear for Vigol who was tried for high treason?

A.—I did.

Q.—What were the charges against him?

A.—Levying war against the United States.

Q.—Did you not in the first trial of John Fries, in the year 1799, contend that resistance to a particular law of Congress was not treason, but only a riot?

A.—We did.

Q.—And in the case of Vigol you did not make that point ?

A.—I was misinformed relative to the facts in the case of Vigol, and did not prepare myself to argue the law—having no doubt from what had been related to me, that he would be acquitted upon the facts—but they turned out to be very different in the trial. Before the second trial of Fries I considered the point, and intended to have admitted, that resistance to the laws in general, was treason, but to deny that resistance to a particular law was treason.

Q.—Was not the same question raised and argued on the first trial of Fries which you intended to have raised upon the second trial ?

A.—It was, and the offence was declared to be treason.

Q.—When a new trial was granted, was it upon the ground that the court had given an erroneous opinion concerning the law ?

A—It was not.

Q.—How long did the first trial last?

A.—I cannot say precisely—it was however a long time.

Q.—Did not Mr. Dallas appear with you for Fries in the first trial?

A.—He did.

Q.—Had you any new points to urge on the second trial which you did not make upon the first?

A.—The first verdict having been set aside, and a new trial granted, I considered that we were not bound by that decision, but were at liberty to proceed, as if there had been no trial. There was, however, another ground on which we meant to rely, which was this—The law of the United States declares that all offences shall be tried in the county where they are committed, unless prevented by necessity.—At the time of the first trial of Fries, the insurrection was not quelled in the county of Northampton, where the offence was committed, and therefore the trial could not have been held there with safety. But at the second trial, nothing of that kind existed, and we meant to contend that the trial should be held there.

Q.—Did you make that point before the court?

A.—I did not—I considered that I should profit Fries more by withdrawing from his defence than by defending him.

Q.—by Mr. Hopkinson.—Did not the court offer to assign Fries new counsel after Mr. Dallas and yourself had withdrawn?

A.—I believe they did, but I do not know it for certain, as I was not in court at the time.

Q.—Mr. Randolph. I understood the witness to have said, that by withdrawing from the defence of Fries, you expected to render him more service than if you continued his counsel. Why did you think so?

A.—It appeared to me that the conduct of the court would justify the counsel in withdrawing; and it did appear much more likely, that the President would pardon him after having been convicted without having counsel than if he had.

Q.—Were the jury attending in court at the time the papers were thrown down by the court?

A.—It was usual to call over the jury every morning, and a number of them were present at the time. I do not believe that they were called over for the trial, because as I before observed, I do not recollect that that day was appointed for the trial of Fries.

SATURDAY, February 9.

Evidence on the part of the United States.

Alexander James Dallas sworn.

Mr. Nicholson. Please to state your knowledge relative to the trial of Fries.

Mr. Dallas. I will endeavor to be as correct as I can in stating the facts relative to the trial, and also the order in which they took place, as well as the language used; but from the length of time which has elapsed since the trial, it is probable I may be mistaken in some part of my relation, as to the language and the order in which the facts took place.—— When the prisoners who were charged with having committed an insurrection in the counties of Bucks and Northampton were brought to Philadelphia, Mr. Ingersoll and myself were applied to by some gentleman in Philadelphia, to undertake their defence. Mr. Ingersoll being at the time attorney general of the state of Pennsylvania, determined not to defend them. About this time Mr. Lewis was also spoken to, and engaged in their defence. This produced a meeting at the jail where the prisoners were, and we gave the necessary information relative to a preparation for trial. A Mr. Ewing, a gentleman of the bar had been employed to defend some of the prisoners, and undertook the defence of Fries with us. This was the first trial, the circumstances of which have been related.

On the morning of the second trial, I did not enter the court until some time after it was called. Fries was then in the box assigned for the prisoners. I pressed towards the bar, when my attention was attracted by an animated conversation which was taking place, between Mr. Lewis, and Mr. Edward Tilghman.—— When Mr. Lewis observed me, he met me, and related what he has stated here, He said that Judge Chase had declared that the court had made up their minds with respect to the law relative to treason, and had ordered three copies of the opinion to be made out; one for the attorney of the district; one for the prisoner's counsel; and a third for the jury to take out with them. After having exchanged our sentiments, we entered the bar together, something fell from the court, which caused a reply from Mr. Lewis. I believe the question was, whether we were ready to proceed with the defence. Mr. Lewis observed that there were no doubts as to the facts, and as the court had made up their minds as to the law he did not expect that he should be able to change them; and that he should decline acting as counsel for Fries. I at this time addressed the court and recapitulated what had been told me by Mr. Lewis, thinking that there might be some mistake, for although I was certain that Mr. Lewis would not have related any thing that was not true, yet I deemed it probable that I might have misunderstood him.

After a moment's pause, in order that I might be corrected if in an error, I proceeded and delivered some general remarks as to the powers of the court and jury in criminal cases; and concluded by stating to the court my determation not to consider myself as counsel for the prisoner any longer, under the opinion which the court had given.

I remember to have heard Judge Peters say to Judge Chase, "I told you so; I knew they would take the stud." Judge Peters also on the same day expressed a wish that we would proceed with the defence, and to take any range we pleased. The bar and the audience appeared extremely surprised at the transactions of the day. On the second day it became the subject of altercation whether we had a right to address the jury upon the law. Judge Chase then said, that although he had before stated, that we must not, yet that we might address the jury on the law, but it would be at the hazard of our reputation. This had the contrary effect rather than to induce me to proceed. In the evening of that day, Mr. Lewis and myself visited Frise at the prison. We stated to him, that we had two objects in view, the first was that of saving his life, and the second to maintain our privileges as members of the bar. We told him that under the then existing circumstances, we

had no hopes of an acquittal, as there were no doubts as to the facts and the court having made up their opinion as to the law and the jury having heard the declaration of the court which would influence their verdict. And we told him that if he would consent to our withdrawing from his defence, and refuse to accept other counsel, it would be a strong recommendation to the President for a pardon. He appeared at first extremely alarmed, but after some time he agreed to our proposition. We told him at the same time that if he insisted on it, we would proceed to defend him at every hazard.

On the next day we both stated to the court that we were no longer his counsel, upon which both Judge Peters and Judge Chase spoke in the manner in which Mr. Lewis has stated it. We determined to adhere to our determination of withdrawing. Judge Chase then said that we might think to embarrass the court, but we should find ourselves mistaken. He then asked Fries if he wished other counsel assigned him. The prisoner replied that he did not know what was best for him to do, but would leave it entirely to the court. Judge Chase then observed, that by the blessing of God, they would do him as much justice as the counsel who had been assigned him.

I then left the court, and I believe Mr. Lewis did also.

On the first trial of Fries we were allowed to address the jury both on the law and on the fact—to read what authorities we pleased, both before and after the revolution in England, and also the statutes of Congress in order to shew that Fries had only been guilty of a riot. Our law points were, that the constitution had defined the law concerning treason, and that the legislature, nor the judges had the power of defining it. We argued that the judges before the revolution in England held their office at the pleasures of the crown, and therefore would make any thing treason.—We took up the common law decisions to shew, not what was the law but what had been their decisions. We cited the case of the man whose stag the king killed, and who wished the horns of the stag in the king's belly, and also that of the inkeeper who kept the sign of the crown, and who said he would make his son heir to the crown, in order to shew the great lengths to which the doctrine of constructive treason was carried.—We then contended that although the judges since the revolution in England, had become independent of the crown, yet they considered themselves as bound by these decisions of their predecessors, and therefore ought not to be considered as authorities to govern our courts on the subject of treason. We also read the statutes of Congress, particularly the first section of the act called the *sedition law*, in order to shew that the legislature of the United States had declared the offence of which Fries was charged to have committed to have been only a riot, and punishable with fine and imprisonment. We attempted to show a difference between the case of Fries and the western insurrection, and I was surprised that the cases should have been decided to be similar. After a new trial was granted, my attention was almost entirely directed to the object of shewing a difference between the two cases at the second trial. This is all that I recollect of the circumstances, but whatever might have been my conduct in order to save the life of the prisoner, yet I never had the least intention of bringing the court into odium.

Mr. Nicholson—was the jury present at the time that Judge Chase declared that the counsel on questions of law must address themselves to the court?

Mr. Dallas—I knew not whether he made this declaration on the first day, as I before stated, that I was not in court at the time and it was related to me by Mr. Lewis.

Mr. Nicholson—when the judge observed that you might proceed at the hazard of your reputation, were the papers withdrawn

Mr. Dallas—I knew not, but I think the judge observed that they were.

TRIAL OF THE

Hon. SAMUEL CHASE, Esq.

Continued.

MONDAY, February 11.

Evidence on the part of the United States.

Edward Tilghman, ſworn.

Mr. Nicholſon—Pleaſe to relate any information you may poſſeſs relative to the trial of Fries.

Mr. Tilghman—I was preſent at the circuit court of the United States for the diſtrict of Pennſylvania, on the 22d of April 1800, very ſhortly after the court was called, but whether the general pannel of the jury was called over I do not recollect. Judge Chaſe declared that the court had maturely conſidered the law, ariſing upon the overt acts charged in the indictment againſt John Fries. That they had reduced their opinion to writing.—He mentioned that he underſtood that at the former trial of Fries, much time had been waſted. and that in order to ſave time they had ordered three copies of their opinion to be made out by their clerk, one to be delivered to the attorney for the diſtrict, another to the counſel for the priſoner, and a third to be delivered to the jury to take out with them. I took no notes on the firſt or ſecond day. Fries was tried on the third day, and having been appointed in conjunction with Mr. Moſes Levy, counſel for Hainy and Getman who ſtood indicted for treaſon, and who were tried on the twenty-ſeventh or twenty-eighth day of the month. I deemed it my duty to attend to the trial of Fries, and to take notes of the evidence—the arguments of the counſel—and the charge of the court to the jury. I do not recollect that Judge Chaſe ſaid any more on the firſt day previous to his throwing the paper or papers down on the bar table.—When they were thrown on the table the judge expreſſed himſelf in theſe words. "nevertheleſs counſel will be heard!"—The throwing down of the paper or papers (for I know not whether there was more than one) and the addreſs of the judge cauſed a degree of agitation at the bar—and a ſhort time after the judge uſed the laſt expreſſion, I looked around and ſaw Mr. Lewis coming towards the bar: I ſtepped towards him and met him oppoſite the entrance of the priſoner's bar. The priſoner was not then in court but was bro't in ſome time that morning. I entered into converſation with Mr. Lewis, and as well as I can recollect, during that converſation Mr. Dallas came into court—ſome converſation took place between him and Mr. Lewis in my hearing, after which they came forward to the bar table. The paper was then handed by Mr. Caldwell the clerk to Mr. Lewis. Mr. Lewis caſt his eyes upon the paper and threw it from him, as it appeared to me, without reading it. The moment he threw it down, he obſerved, "my hand ſhall never be ſtained by receiving a prejudged opinion, or one made up without hearing counſel." I have not any recollection of any thing further paſſing on the firſt day between the counſel and the court; when Mr. Lewis made uſe of the laſt expreſſion, his face was not turned towards the court, and

he ſpoke with much warmth. The paper which had been thrown on the table laid there a conſiderable time, after which ſome gentlemen of the bar took it, and I for one copied it; whether I copied the whole I cannot tell. The priſoner being then brought into court, his counſel had a good deal of converſation with him upon the point, whether they ſhould be his counſel or ſhould withdraw. I do not recollect whether Fries was brought up that day for trial. After the adjournment of the court which was early in the day, I went home, and after dinner I took a walk: upon my returning home, I ſaw the attorney of the diſtrict at my door in the act of departing—when he ſaw me he waited until I came up and aſked me whether I had any objection to deliver up the copy which I had taken of the paper thrown by the court. I anſwered that I had not, and immediately delivered it to him. I alſo informed him that Mr. Thomas Roſs, a gentleman of the bar, had taken a copy, and he departed. The paper was not read by the court nor any thing ſtated by them to be the ſubſtance of it.—On the next morning the priſoner was again brought into court and placed at the bar. The court then aſked his counſel whether they were ready to proceed with his trial. Mr. Lewis roſe and made uſe of a few words tending to ſhew that they were no longer counſel for Fries. Judge Chaſe interrupted him, but I do not recollect the preciſe words—the ſubſtance was, that the counſel were not to conſider themſelves as bound by the opinion of the court, but were at liberty to combat that opinion on both ſides. He appeared to be anxious that the counſel ſhould proceed with the defence of the priſoner. He obſerved that caſes at common law concerning treaſon ought not to be read to the court, and mentioned the caſe of the man in England whoſe ſtag the king killed, and who wiſhed the horns in the king's belly, and alſo the caſe of the man who kept the ſign of the crown, and who ſaid that he would make his ſon heir to the crown. He ſaid ſuch caſes as thoſe muſt not, ſhould not be read, and I think made uſe of this expreſſion, "what caſes from Rome, Turkey, or France?" That the counſel might cite what was law, but not what was not the law. Judge Chaſe further obſerved that he had an opinion in point of law as to every caſe that could be brought before the court, or he was not fit to ſit there. He ſaid ſomething as to the counſels proceeding or not proceeding, agreeable to their conſciences, and obſerved that the gentlemen would proceed at the hazard of their characters.

When it appeared that the counſel would not proceed in the defence of Fries, Judge Chaſe obſerved, "you may think to bring the court into difficulties gentlemen, but if you do you miſs your aim." Judge Peters ſeemed very ſolicitous that the counſel ſhould proceed, and aſked them whether if an error had been committed by the court, why ſhould they not be at liberty to correct it, and added that the papers had all been withdrawn, and I think that both the judges concurred in ſaying that the caſe was to be conſidered as if the paper had never been thrown on the table. When Judge Peters obſerved that the paper had been withdrawn, it was replied that the court could not eraſe an opinion which had been formed without hearing counſel. Mr. Dallas addreſſed the court, but I have not recollection of what he ſaid. The counſel continued firm in their determination of abandoning the priſoner. The court took great pains ro induce them to act, and before the piiſoner was remanded to jail, expreſſed their hope that the counſel would think better of it the next day, and appear in his defence. I recollect nothing more on that day. On the third day the priſoner was brought up and aſked whether he had any counſel. He replied that he had none, and that he would depend upon the court to be his counſel. Judge Chaſe then ſaid "then by the bleſſing of God the court will be your counſel, and will ſerve you as well as your counſel would have done." The trial then proceeded, and after the evidence, and a ſhort ſtatement of the law by the diſtrict attorney, judge Chaſe charged the jury. He told them that they were the judges of the law as well as the fact, and that caſes decided in England before their revolution, would not be received by the court as the law

with reſpect to treaſon. I have my notes of the charge, ſtating the law of treaſon, which is very much the ſame as the opinion of Judge Patterſon, delivered in the caſe of Mitchell, in which I was counſel for the priſoner.

Queſtion by Mr. Randolph.

You ſay that when the written paper was thrown on the bar table, it produced conſiderable agitation. From what cauſe do you ſuppoſe that it aroſe?

Mr. Harper.—I muſt take the opinion of the court as to the propriety of putting that queſtion. On Saturday laſt we heard much legal opinions given in the teſtimony, and now opinions being aſked: however high we might eſtimate the opinions of Mr. Tilghman, yet it is not evidence, and we muſt take the opinion of this honorable court.

The Preſident requeſted Mr. Randolph to reduce the queſtion to writing, which having been done, the queſtion was taken in the court, whether it ſhould be put to the witneſs, and determined unanimouſly in the negative.

Queſtion—You have been a long time at the bar, did you ever see a proceeding ſimilar to that in the case of Fries?

Answer—I have been in the practice of the law for thirty one years, and I have no recollection of a ſimilar proceeding.

Q When Mr. Chase said that counsel would be heard, did he say that the counsel must address themselves to the court on the law and not to the jury?

A At that time he said nothing of that sort, nor do I recollect that he ever did say so.

—

Edward Tilghman—cross examined by Mr. Harper.

Q You say, Mr. Tilghman, that you are certain that when the paper was thrown down, that Judge Chase did not say that the counsel must address themselves to the court on the law?

A I am certain.

Q Have you any recollection that the court at any time forbade the counsel to address the jury on the law?

A I have not.

Q Did Judge Chase say that the counsel should not be suffered to read the acts of congress?

A I do not recollect to have heard any thing said concerning the statutes of congress.

Q Did Judge Chase express disapprobation at the other courts having suffered these laws to be read?

A I do not recollect that he did.

Q By Mr. Hopkinson—Did you observe any disposition in the court or in Judge Chase to oppress John Fries?

Mr. Nicholson—I object to that question.

Mr. H.—I withdraw it.

Q By Mr. Martin—Is it not customary for courts in criminal cases to charge the jury as to the law?

A The usual practice in the courts in which I have been, is for the court to permit the counsel on both sides to argue the law before the jury at length, and after they finish, to charge the jury. They generally inform them what in the opinion of the court is the law, but that the jury are the judges both of the law and fact—The counsel generally pursued that course which they conceived to be most advantageous for the clients, and in capital cases I have never seen them stopped by the court.

Q by Mr. Nicholson—In all your practice both in Pennsylvania and Delaware, have you ever known an instance of the courts informing the jury what was the law previous to counsel being heard?

A I never have.

Q by Mr. Martin—Did the court in the case of Fries tell the jury what was the law, before they requested the counsel to proceed?

A They did not, nor when they charged the jury, was the paper which had been thrown down mentioned. The jury were not sworn.

Q by Mr. Nicholson—were the jury attending at the time the paper was

thrown down and in a situation that they could hear what passed?

A The general pannel attended with great punctuality, and although I have no positive recollection, yet I am pretty certain that a number of them were present. I have looked over the list of the jury who served, and those who were challenged, in order to discover whether I could recollect to have seen any of them at the time, but my memory totally fails me. Generally when the court is open, the jury box is filled, which will hold but eleven—and every time we try a cause, a chair is brought for the twelfth juror. The rest of them remain in the hall of the court. When judge Chase observed that the counsel might proceed at the hazard of their character, the general pannel was in court.

Q by Mr. Randolph—Did not judge Chase say that the law had been settled?

A I do not recollect that he did, nor was it stated that the opinion in the paper was the opinion delivered in the trials of Vigol and Mitchell or in the first trial of John Fries.

Q How many copies were taken of the paper thrown down by the court?

A I do not recollect to have seen any taken but the one taken by himself and the one by Mr. Ross. They were all copied at the bar table where the paper was thrown, nor was the opinion ever carried from the bar table, where the jury had not access.

Q by Mr. Nicholson—did you hear the subject spoken of that day?

A We who took copies of the opinion spoke our opinion on it, and it was a subject of much conversation among the gentlemen of the bar.

Q You say that it is usual for courts to charge juries on the law, have you ever known the court to reduce their opinion to writing and to give it to the jury to take out with them?

A. I never saw an instance of the kind in my life.

William S. Biddle sworn and examined by Mr. Randolph.

Q Were you present at the trial of Fries, and when copies of a written opinion of the court were thrown down on the bar table?

A My recollection upon that subject is very imperfect; but I have some recollection that the copy which I took, was from a paper thrown down by judge Chase. I copied the substance of the opinion upon treason, but not the whole. No application was made to me for the copy which I had, nor did I communicate to any person that I had it, until during the last session of congress, when, having some conversation with the gentleman of the bar in Philadelphia, concerning the opinion, Mr. Dallas observed that he had never seen it, and expressed a wish to read it. I then observed that I believed I had a copy of it, and went over to my office and brought it to him.

Q Would you know the paper you copied?

A I would.

Q Is that it? *(producing a paper)*

A It is.

Q Did you hear much conversation concerning the opinion?

A I do not recollect. I believe there was among the members of the bar; but I know not whether any of the jury heard it?

—

William S. Biddle cross examined.

Q In the paper which has been produced, and which you say is the copy which you took, there are a number of references: were they made by yourself, or were they in the opinion?

A I do not recollect precisely. The authorities mentioned on the last page are all made by me.

Q You say, that no application was made to you for the copy of the opinion which you took. Do you know that the court or the district attorney knew that you had taken a copy of the opinion?

A I do not know that either of them knew it.

William Rawle, affirmed.

Q Were you present at the trial of Fries?

A I was.

Q What took place on that occasion?

A The circuit court of the United States, for the district of Pennsylvania, met on the 11th of April, 1800. As the proceedings against John Fries were considered as not to be revived, without the interposition of an act of congress, it appeared best to me to move the court, on the first day of their session, to quash the indictment against him. This I accordingly did, and the court granted my motion. Upon the same day the court charged the grand jury, and I sent up to them, among others, an indictment against John Fries, which was returned a *true bill*. On the 16th of April John Fries was brought to the bar, arraigned, and plead not guilty. I can't say whether Messrs. Lewis and Dallas were on that day assigned him by the court as counsel, or whether they continued to act, having been his counsel on the first trial. Copies of the indictment were furnished to Fries and his counsel. The trial was then postponed on account of the absence of a material witness, and it was not assigned for the day, which Messrs. Lewis and Dallas have given testimony of, and which has been called the first day of the trial. Fries might have been in the box, through mistake, because, that I had on a certain day directed the marshal to bring up a number of persons, charged with seditious practices, and Fries might have been brought with them. Shortly after the court met. Judge Chase observed that the court had made up their minds as to the law of treason, and to avoid being misunderstood, they had reduced their opinion to writing, and that they had directed three copies of the opinion to be made out; one for the district attorney, another for the counsel for the prisoner, and a third for the jury, to be delivered to them after the case had gone through, on the part of the prosecution. As these words were pronounced, several papers were thrown, I know not whether by the court or the clerk. I took up one of them and began to read, but casting my eyes up, I saw Mr. Lewis on the opposite side of the table, with one of the papers in his hand which he looked at with apparent indignation, and then threw it on the table. I cannot call to my recollection any thing further that passed between the counsel and the court on that day. I perceived much agitation among the gentlemen of the bar; but having a great burthen of criminal prosecutions on my hands, I could hear nothing until the court rose. In the course of that morning 21 persons were brought to the bar for seditious combinations, and submitted to the court. The court rose early in the day, and requested me not to examine the witnesses on those cases of sedition. After the court rose, I understood that the counsel for Fries, meant to decline acting in his defence. I have an indistinct recollection of hearing this from Mr. Dallas. Soon after I got home on that day, judge Chase and judge Peters came to my house. We went into another room, from that in which I was sitting, when judge Peters began by expressing an apprehension that the counsel for Fries would decline acting for him. Judge Chase observed that he could not suppose, that that would be the case. I supported the opinion of judge Peters, and stated that the gentlemen of the bar of Philadelphia, were very independent, and that in my opinion the counsel for Fries would not proceed, unless the papers were withdrawn, and they were permitted to go on in their usual way. Judge Chase observed that he was sorry that the opinion had been considered in the light it was, and that it was not intended to preclude the counsel from going on in the usual manner, provided they thought proper. Both the judges then requested me to obtain all the copies of the opinion which had been taken, which I readily promised to comply with. I recollected to have seen Messrs. Tilghman and Ross taking copies of the opinion. I went to their houses and requested them, which they gave to me immediately, and I took them to Mr. Caldwell, the clerk of the court. I asked him whether he knew of any other persons taking a copy and he an-

ſwered that he believed that Mr. William Meredith had; upon which I requeſted him to go to Mr. Meredith and try to obtain it. I did not at that time know that Mr. Biddle, who was then a ſtudent of mine, had taken a copy; nor did I then recollect that I had one of them myſelf. I therefore did not hand it to the clerk, but have it now in my poſſeſſion. The papers which were thrown down did not appear to me to be read by any perſon, but thoſe who copied them; and I entertained an anxious hope on the next day, that the gentlemen who were concerned as counſel for Fries would proceed in his defence and be ſatisfied.

I will now, with the permiſsion of the court, refer to ſome original notes which I took upon the remaining part of the transaction.

On the 23d day of April, John Fries was brought to the bar. The court then addreſſing themſelves firſt to me, and then to the counſel for Fries, aſking if we were ready to proceed with the trial? to which I anſwered affirmatively. Mr. Lewis then obſerved, that if he had been employed by the priſoner he would think himſelf bound to proceed; but having been aſſigned as his counſel. (He was here interrupted by judge Chaſe, who ſaid you are not bound by the opinion delivered yeſterday, but are at liberty to conteſt it on both ſides.) Mr. Lewis anſwered, that he had underſtood that the court had made up their minds as to the law, and as the priſoner's counſel had a right to addreſs the jury, both on the law and the fact, it would place him in too degrading a ſituation, to argue the caſe after what had paſsed, and therefore he would not proceed with the defence. Judge Chaſe anſwered with impatience, "You are at liberty to proceed as you think proper. Addreſs the jury and lay down the law as you think proper" Mr. Lewis anſwered with conſiderable warmth, "I will never addreſs myſelf to the court upon a queſtion of law in a criminal caſe." He then went into a lengthy argument upon the law of high treaſon in England, previous to their reſolution, and contened that the courts ſince that period had conſidered themſelves as bound by thoſe decisions which were made prior to it. Judge Chaſe obſerved that the counſel muſt do as they pleaſe. Mr. Dallas then roſe and went into a general view of the ground, which had been taken by Mr. Lewis, and concluded with his determination not to pro obſerd counſel for Fries. Judge Chaſeved, ascee "no opinion has been given as to the facts of the caſe I would not ſuffer the witneſses, againſt thoſe perſons charged with ſeditious combinations to be examined before the trial of Fries came on, leſt their evidence might have been heard by ſome of the jury. As to the law, I know that the trial before took a conſiderable time, and that caſes at common law and decisions in England before the revolution on the law of treaſon; ſuch as the caſe of the man whoſe ſtag the king killed, and wiſhed the horns of the ſtag in the king's belly, and the caſe of the inn-keeper, who kept the sign of the crown, and who ſaid he would make his ſon heir to the crown. Theſe caſes ought not, & ſhall not go to the jury. There is no caſe which can come before me on which I have not a decided opinion, as to the law, otherwiſe I ſhould not be fit to preside here. I have always conducted myſelf with candor, gentlemen, and meant to have ſaved you trouble by what I did? It is not reſpectable for counſel to ſay that they have a right to offer what they pleaſe to the jury. What, would you cite decisions in Rome in Turkey or in France? you will now proceed and ſtand acquitted or condemned in your own conſciences as you conduct the defence, and go on in your own way. The caſe will be opened by the attorney—the manner muſt be regulated by the court." judge Peters added that the papers were all withdrawn. Mr. Lewis ſaid the paper was withdrawn but the impreſsions remained with the jury; he therefore ſhould not act. A pauſe then enſued for a few moments, when judge Chaſe ſaid: "you cant bring the court into difficulties, gentlemen, you do not know me if you think ſo." He then cauſed the avenue to the priſoner's bar to be cleared, and aſked Fries whether he was ready for his trial, or whether he wiſhed other counſel aſſigned him. Fries appeared very much alarmed and replied, that he did not know what to do. I then informed the court

that as this was a remarkable cafe, I hoped the trial would be poſtponed until the next day, which was readily acquiesed in by the court, and Fries was remanded to priſon. On the next day he was again brought to the bar, and aſked whether he would have counſel aſsigned him, he replied with much firmneſs that he would look to the court to be his counsel. Judge Chaſe then anſwered; "then by the bleſsing of God the court will be your counſel, and will do you as much juſtice as thoſe who were your counſel."

The jury were then called, and judge Chase took particular pains to inform Fries of his right to challenge, and that he might challenge thirty five without shewing any cause, and as many more as he could shew cause against. After the jurors had been passed by Fries, judge Chase, after asking them whether they were related to the prisoner; asked "whether they had delivered an opinion as to the guilt of Fries, or that he ought to be punished." The first juror answered in the negative, and was sworn on the jury—the second observed, that in a conversation which he lately had, he had declared that Fries ought to be punished—he was directed by the court to be set aside. The question was then directed to be put by the clerk to each juror in this manner: "Have you formed or delivered an opinion relative to the guilt of the prisoner?" This was put to three jurors; when, by the direction of the court, it was changed and put as follows: "Have you formed and delivered an opinion relative to the guilt of the prisoner?" Three persons answered affirmatively, and were set aside. The prisoner challenged thirty four. Twelve jurors having been passed were sworn. John Fries called no witnesses, but at the end of the examination of every one on the part of the prosecution, judge Chase reminded him of his right to put questions to them; but charged him not to put any one which might criminate himself. After the evidence closed, I addressed the jury in as brief a manner as I could, consistent with my duty. The court then charged the jury, and they retired to their room, and in about half an hour returned with a verdict of "GUILTY." These are the general facts which took place. If I am asked any question I will endeavor to answer it.

Questions by Mr. Randolph.

Q Did you hear Mr. Lewis when he threw down the paper, which was handed him, declare that his hand should not be polluted by a prejudicated opinion?

A I have no recollection of hearing Mr. Lewis say any thing at the time.

Q Mr. Lewis declared that he would not address the court on a question of law in a criminal case. Did you hear any opinion given by the court, which warranted Mr. Lewis in the opinion that he was to be precluded from addressing the jury on the law?

A The court said that they would not suffer such cases as I have mentioned to be read to the jury, to mislead them, but I did not hear the court say that the counsel should not address the jury on the law.

Q You have stated that both the judges came to your house, soon after you returned from court the first day. Was that their place of abode?

A It was not.

Q You have stated that judge Peters declared his apprehensions that the counsel for Fries would not proceed in his defence, and that you concurred in opinion with him. Had you any reason for apprehending it but your knowledge of the independency of the bar of Philadelphia?

A I think I understood, from some of the gentlemen of the bar, that the counsel for Fries meant to decline acting, and I have an impression on my mind, that I heard something of that kind fall from Mr. Dallas.

Q Did you express, to the judges, this knowledge?

A I believe I did not.

Q Did you ever know an opinion to be given in a criminal case before counsel were heard?

A I never have, except so far as charges to grand juries may be termed opinions on the law.

Q Did much converſation take place on the ſubject of this opinion?

A Situated as I was, I can't undertake to ſay that I had any converſation on the ſubject, until the court roſe.

Q Do you ſuppoſe that the conduct of the court and counſel attracted the notice of the jury?

A From the number of perſons ſummoned, I conceive that a number of them knew not what was going on.

Q From what did you infer the indignation of Mr. Lewis, if you did not hear any expreſſions that he uſed?

A From his countenance.

Q Did that attract the attention of the court at the time?

A If they were looking at him, it muſt have attracted their attention.

Q Did you hear judge Chaſe ſay, that the counſel muſt addreſs themſelves to the court on the queſtions of law?

A I have no recollection of hearing any thing of that kind fall from judge Chaſe. In criminal caſe, however, there are a number of motions which muſt be made, excluſively to the court; ſuch as a motion to quaſh an indictment.

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Queſtions by Mr. Nicholſon.

Were your notes, of the converſations which took place, made in the order of time in which they took place?

A Preciſely ſo.

Q What was there in judge Chaſe's converſation that induced Mr. Lewis to think, that he ſhould be precluded from reading the ſtatutes of the U. States, to the jury?

A I know not why Mr. Lewis tho't ſo, unleſs from the ſtrenuous oppoſition which was made to them, on the firſt trial of Fries, on the part of the United States. Judge Chaſe ſaid, that no caſe could come before him, on which he had not an opinion on the law.

Q Was there any thing in the conduct of the court, which induced Mr. Lewis to believe that he was to be precluded from arguing the law to the jury, and cauſed him ſo often to declare, that he would not addreſs himſelf to the court in a criminal caſe?

A It appeared to me to be a miſapprehenſion of Mr. Lewis. He ſuppoſed that it was intended to withdraw the queſtion of law from the jury, and I thought the court did not ſet him right as explicitly as they might have done.

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Queſtions by Mr. Randolph.

You ſay, Mr. Rawle, that after the papers were called in, you entertained an anxious hope, that the counſel would be induced to proceed with the defence of the priſoner. I wiſh to know your reaſons for having ſuch an hope, and why you became the agent of the court?

A My reaſons were, that I did not wiſh to be put in the ſituation in which I was afterwards placed, and in which I never wiſh my greateſt enemy to experience the pain which I felt, that of being obliged to proſecute a man arraigned for a capital offence, and who was without the aſſiſtance of profeſſional gentlemen. I therefore was anxious that the counſel for Fries ſhould proceed in his defence, and ſave me from ſo painful a ſituation.

Q Did you take any notes of the tranſactions which took place on the firſt day of the trial?

A I did not.

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William Rawle croſs examined by Mr. Harper.

Q Did judge Chaſe ſay any thing to reſtrict the council from citing any ſtatutes of the United States?

A He did not, in my hearing.

Q Did he ſay that he diſapproved of the conduct of the court in the firſt trial of Fries?

A He did not.

Q Have you the paper now which judge Chaſe threw down?

A I have.

(He here produced the opinion and Mr. Harper read it to the court.

Q Did not the court after the jury had returned a verdict of guilty againſt Fries, inform him that if he had any thing to ſay in arreſt of judgment that he would be heard?

A They did and the anſwer of Fries was, that he had nothing to ſay.

George Hay sworn.

Mr. Hay. The greater part of the evidence which I ſhall give relates to the conduct of one of the judges of the circuit court, (for I did not hear the voice of judge Griffin during the whole tranſaction,) and the counſel for Callender, of which I was one. The length of time which has elapſed will prevent me from giving an account of the whole tranſaction, unleſs I ſhall be allowed to uſe a ſtatement which I have, in order to refreſh my memory.

Mr. Harper. I ſhall certainly object to the witneſs's uſing the ſtatement to refreſh his memory. It does not appear that the ſtatement was made at the time, or by himſelf and I think it inadmiſſible.

Mr. Nicholson. The gentleman does not wiſh to read the ſtatement in evidence, but merely to refer to it to refreſh his memory. I therefore preſume he may be ſuffered to proceed

Mr. Rodney. I believe the learned counſel for the reſpondent has ſtated the law upon too broad a baſis. The witneſs does not intend to ſtate any thing which he does not know, but only wiſhes to be able to relate the whole by looking at the ſtatement. I preſume that if one gentleman had taken notes at the trial of Callender, and another was called to give evidence, who had taken no notes, hes would be permitted to look at the n ote of the other, in order to bring to his recollection circumſtances which he had forgot. I therefore conceive that Mr. Hay ought to be ſuffered to refer to the ſtatement to refreſh his memory.

Mr. Martin. I believe I have practiſed law as long as either of the managers, but the practice in the ſtate of Maryland may be different from that of other ſtates. have always underſtood that the only caſes in which a witneſs is allowed to refreſh his memory is, when he has made a ſtatement at the time the tranſaction took place. Before Mr. Hay came into court he might have looked at the ſtatement to refreſh his memory, ſo he might have converſed with a perſon who was preſent at the time; but it will not be ſaid that he ſhall be allowed to converſe with any perſon at the bar of this court, and therefore in my humble opin. cannot make uſe of a ſtatement to refreſh his memory not made by himſelf at the time.

The queſtion was then taken upon allowing Mr Hay to refer to the ſtatement and was determined in the negative. Yeas 16—Nays 18.

Mr. Randolph. Pleaſe to ſtate what took place on the trial of Callender, and firſt, with regard to the over-ruling of the objections of John Baſſet, to ſerve on the jury.

Mr. Hay. I will relate the circumſtances as well as I am able, without the aſſiſtance of the ſtatement of which I have juſt been deprived by the court, and firſt with regard to Basset the juror. Several jurors being called to be ſworn, the counſel for the traverſer inſiſted that they were entitled to the benefit of the conſtitution, which ſecures to the accuſed a right of trial by an impartial jury. I do not recollect the p ecise expreſſions of Judge Chaſe, but I believe they were that he would take care that juſtice ſhould be done the traverſer in that reſpect. Believing that a majority, if not all of the jury, were oppoſed to Callender in political ſentiments, and thinking that their minds might be made up againſt him, we wiſhed to aſk all the jury whether they had formed an opinion on "The Proſpect Before Us." Judge Chaſe told us that that was not the proper queſtion to put, but that he would tell us what was. He then ſtated that the proper queſtion this : "Have you formed and delivered any opinion on the charges in the indictment." To this queſtion the anſwer was neceſſarily given in the negative, becauſe none of the jury had ſeen this indictment. When Mr. Basset was called up to the book, by the marſhall, he manifeſted ſome reluctance to ſerve on the jury. He ſaid he had made up his mind as to the book, and that it came under the ſedition law. I do not pretend to ſay that theſe were his words ; but that is the impreſſion on my mind. This objection was overruled by the judge ; and he was aſked whether he had formed and delivered an opinion relative to the charges in the indictment ? He anſwered in the negative, and was ac-

cordingly sworn on the jury. In the then state of things, and knowing the temper in which the people were, I would not ask the juror a single question without the permission of the court. I therefore applied to judge Chase to allow me to put a question to the juror, I will not pretend to state his answer literally but I think it was this ; " What is the question you mean to put? State it and if I think it a proper one, you may propound it. Come what is your question." Notwithstanding the humiliation I felt in being addressed in this manner, I stated to the court the question, which I wished to put to the juror. It was : " Have you formed or delivered any opinion concerning the book called the " Prospect Before Us," from which the charges in the indictment were extracted." Judge Chase replied, " No sir, you shall ask no such question." This is all that I recollect relative to the overruling the objection of Mr. Basset. It was stated by Callender to his counsel, that Col. John Taylor was a material witness for him. In the interval, between the finding of the presentment and the trial, Colonel Taylor was summoned to attend ; but I did not see him until a short time before the trial, and had no opportunity of asking him what he could prove. After the attorney for the United States had opened his case, and the evidence in support of the prosecution had been gone through, Colonel Taylor was called to the book and sworn. Probably while he was swearing, judge Chase asked the counsel for Callender, what they expected to prove by the witness. Mr. Nicholas said, that he did not know what could be proved by him, but that we expected to prove what would amount to a justification of one of the charges : That Mr. Adams had avowed sentiments hostile to a republican government, and that in the senate he had voted against certain laws. I think Mr. Nicholas observed that he hoped it would not be understood that he should be tied down to this charge, but should examine Col. Taylor as to any thing else he might know, which would benefit Callender. Judge Chase then requested the counsel to reduce the questions to writing, and submit them to the inspection of the court. An objection was made to this, but it was at length done, and judge Chase declared the evidence to be inadmissible, on the ground that it did not go in justification of one entire charge. The judge was asked whether we might not prove a part by one witness, and a part by another : Judge Chase replied, that the law was as he pronounced it, and that this could not be done, and that Colonel Taylor's evidence did not go to prove the whole. I observed that I thought Colonel Taylor's evidence would go to prove both sentences of the twelfth charge ; that Mr. Adams was an aristocrat, and had proved serviceable to the British interest, in the manner which Callender meant. The judge did not say in express terms that the position was wrong, but he said that the evidence was inadmissible, and the counsel for Callender knew it to be so.—I believe at the same time he observed, that our attempt was to deceive and mislead the populace ; finding that the attempt which I made to render service, not to Callender but to the cause which I had espoused, instead of proving serviceable only, brought a charge which I little expected. I said no more, and the evidence was rejected. When we were requested by the judge to reduce our questions to writing, I felt no disposition to do it, and they were stated by Mr. Nicholas. Before the questions were reduced to writing, Mr. Nicholas made some remarks on the difference of the mode persued on the part of the U. States, and that the attorney for the U. States had not been required to state any question in writing. Judge Chase replied : " The attorney, when he opened his case, stated what he expected to prove ; but although he did this, *we* were not bound to do it." My impressions are that the word " we" escaped the judge several times.

The second member of the fourth article relates to a refusal to postpone the trial. In order to procure a postponement, an affidavit was filed ; but whether regular or not, I will not pretend to say. The next member of the article, relates to a subject about which it is painful for me to speak. The judge is charged with rudeness to the counsel. There were many expressions used by judge Chase which were unusual to me and which I believe to be rude.

Mr. Harper. State the expreſsions which were uſed. I preſume that this honorable court are to judge of their propriety and not you.

Mr. Hay. I will ſtate them. The firſt expreſsion which made a ſtrong impreſsion on my mind was this: In the courſe of the argument which we uſed to procure a poſtponement, I took as a ground that the law of Virginia ſhould govern in the caſe of Callender. As ſoon as I got to this part of my argument, the judge gave me to understand that he thought I was wrong, and the idea was a wild notion. I I have already mentioned the language of the judge, with reſpect to the admiſsion of Colonel Taylor's evidence. It was that we knew the evidence to be inadmiſsible and that our attempt was to deceive and miſlead the populace. He was alſo pleaſed to obſerve to us; "gentlemen, you have been in an error and keep preſsing your miſtakes on the court." On more than one occaſion, he charged the counſel with advancing doctrines, which they knew to be wrong. I endeavored to ſatisfy the court that the book ought not to be read in evidence, becauſe the indictment did not refer to it. In the courſe of my argument I obſerved that if the indictment referred to the book and afterwards a proſecution was commenced for the ſame thing, that this proſecution could be plead in bar to it; but that, according to the opinion to which the court ſeemed to incline, the ſituation of the traverſer would be much more hazardous than if the book was referred to; because the traverſer muſt be ſort to particular evidence to prove the proſecution the ſame. The judge was pleaſed to obſerve that I knew this proſecution could be given in evidence in bar to another proſecution. I certainly did know it and was endeavoring to ſhew in what manner it might have been done. In the courſe of the ſame argument, for the purpoſe of ſhewing that my position was true, I obſerved, that the words "tenor and effect," bound the party to a literal recital, and in ſupport of this poſition I quoted ſeveral authorities. The Judge interrupted me again and told me that I was miſtaken. He ſaid that the words "tenor and effect" in an indictment did not oblige the proſecutor to give more than the ſubſtance of the words. He mentioned that he wondered we did not contend for punctuation alſo. This latter part appeared to me to be intended for the bystanders. Mr. William Wirt, who appeared with me in the defence of Callender, was ordered by the judge to ſit down, and the judge determined that the counſel ſhould not addreſs any arguments to the jury on the conſtitutionality of the ſedition law. Mr. Wm. Wirt, in the courſe of the few obſervations which he made, ſtated a propoſition, and then ſaid that the concluſion was ſilogiſtic. Judge Chaſe ſaid, "a monsequitur, ſir." I do not recollect any other expreſsions at this time, with regard to the interruptions of counſel. I cannot ſay how often I was interrupted, but I believe I can say with certainty that I was interrupted oftener by judge Chaſe on the trial of Callender, than I ever was during ſixteen years practice. During all the trial I did not hear the voice of judge Griffin.

Q Were the opinions delivered by judge Chaſe, without apparent conſultation with judge Griffin?

A Judge Chaſe's manner was generally this; after delivering his opinion he would turn to judge Griffin and ſay, "and ſuch is the opinion of the court." I recollect to have ſeen him ſpeak to judge Griffin, but it did not appear to be concerning the law.

Q Are you certain as to the queſtion put by the judge to Baſſet?

A I am.

Q Was a requeſt made to the court that the indictment might be read to the jurors?

A There was, but the court would not ſuffer it to be read.

Q Has it been the practice in the courts of Virginia, for counſel to be compelled to reduce the queſtions which they mean to propound to a witneſs, to writing and ſubmit them to the inſpection of the court?

A I have never ſeen an inſtance of the kind, except in the caſe of Callender. I believe I never heard of ſuch an inſtance. I do not recollect ever to have read of ſuch an inſtance before. I acted as the

profecutor in the caſe of Logwood, and nothing of that kind was done.

Q. Upon what ground did the counſel for Callender, attempt to introduce parol testimony of the votes and proceedings of the ſenate? Were the journals inacceſſible to them?

A. Colonel Taylor came into court juſt before the jury were ſworn, and we had no opportunity of conſulting with him. The queſtions were drawn up in a hurry, and, I believe, without a reflection, that parol testimony was not the best evidence of the votes in the ſenate.

[Here Mr. Hilhouse stated that some of the court had retired from indisposition, and moved an adjournment, which was agreed to, and the court adjourned until the next day.]

TUESDAY, February 12.

The court being called;

Mr. Randolph observed that they would proceed with the examination of George Hay.

Mr. Hay. A very short statement will close my recollection of this case. It was the intention of the counsel for Callender to defend him on the ground of the unconstitutionality of the sedition law. The gentlemen who were associated with me, preceded me in the argument, but were not permitted to address the jury on the point I mentioned. The treatment experienced by Mr. Wirt, I have in some degree related. He was interrupted two or three times by the judge, for the purpose of telling him, that the doctrine for which he was contending, that the jury had the right of determining the law as well as the fact, was true. Mr. Wirt then stated, that the constitution was the supreme law of the land. Judge Chase told him there was no necessity of proving that. Mr. Wirt then went on to argue, that if the constitution was the supreme law, and if the jury had a right to determine both law and factof the case, the concl usion was perfectly syllogistic, that the jury had a right to determine upon the constitutionality of the law. It was at this time that the judge addressed him in the words which I have mentioned, that it was "a non sequitur." At the same time he bowed with an air of derision. Whether Mr. Wirt said any thing after this, I do not recollect. After Mr. Wirt sat down, I arose and addressed myself to the court, and stated, that I addressed my arguments to to them, and them alone, and that I did not wish to be heard by the jury. This observation was intended as a sort of reply to the observation of the judge, that our arguments were intended for the populace. I did not attempt to address the jury on the unconstitutionality of the law; but I addressed myself to the court, in order to convince them that I had a right to do it. After a very short time I was interrupted by the judge, and asked a question, which I conceived a very unnecessary one. I stated to the court, in terms as distinct as I could, the specific purpose for which I meant to contend. I think it was, that the jury had a right to determine every question which was to determine the guilt or innocence of the traverser, The judge asked me whether I laid down this doctrine in civil as well as criminal cases; because, said he, "If you do, you are wrong." I replied, that I considered it universally true, but that it was sufficient for my purpose if it applied to criminal cases only. I went on as well as I was able with the argument, when I was again interrupted by the judge. What the circumstances were or the words used, I do not recollect. I believe that I was interrupted more than twice. My impressions then being that I should be obliged to undergo more humiliation than I conceived necessary, I retired from the bar. When Judge Chase found I was about retiring, he told me to go on. I told him that I

would not. He said that there was no necessity for my being captious. I replied that I was not captious, and that I would not proceed, and immediately retired from the bar, and I believe from the room in which the court was held.

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Questions by Mr. Randolph.

Did any circumstances occur concerning a witness, and what were the observations made by the court?

A I recollect a circumstance which occurred, when a witness was brought forward to deliver his evidence. I stated that I understood that one of the witnesses brought forward to prove the publication of the "Prospect before us," was the man who was employed by Callender to print it. Understanding that this man was, in point of law, equally criminal, I observed, that if any of the witnesses were implicated in the charge, that they were not bound to give evidence. Judge Chase said that these observations were correct, but the witnesses might rest satisfied that they should not be prosecuted if they choose to give evidence. I do not recollect that the attorney said any thing on the subject. In consequence of this assurance of the judge, the gentleman, whose name I think was Rind, gave in his evidence. It appeared by his evidence that he had been employed by Callender, and did print a part of the Prospect.

Q Was there any reference made to the act of Virginia concerning the issuing of process?

A There was a general reference made to the act, but not a specific one: on the motion for a continuance, I observed that the procedure was not in conformity with the laws of Virginia. That the process used ought to have been a summons, returnable to the next court, and that during the interval the accused had it in his power to collect his evidence and prepare for trial. I think it probable, that some other observations might have been made; but for the observations of the judge, on the argument which I used, that the jury had a right to assess the fine, the judge said it was a wild notion, when applied to the courts of the United States. If it had seemed to be the opinion of the court that the laws of Virginia were the rule of conduct for them, we should not have been at the trouble of filing an affidavit for a continuance of the case.

Q Did you ever know a case similar to that of Callender's, where a capias issued as the first process?

A. This relates to a branch of jurisprudence, with which I am but little acquainted. I believe however, that the invariable practice is, for a summons to issue returnable to the next court. It is not usual to try the cause at the second term, when the defendant appears and pleads not guilty.

Q Did you rely on nothing else for a continuance but the affidavit?

A The argument was founded in part on the affidavit of the traverser, and upon our not being prepared to discuss the constitutionality of the sedition law, and the question whether the jury had a right to determine it. I also stated that the doctrine of libels was unusual to me, and that I wished for time to examine into it.

—

George Hay cross examined by Mr. Harper.

Q You have said that you did appear to defend the cause and not the man, explain your meaning?

A It is unpleasant for me to answer that question, but I will do it.

Q I will put it in more general terms. Was it the cause of Callender or some other cause?

A The cause which I alluded to was the cause of the constitution, which I most religiously believed to have been violated by the passage of the sedition law, and I intended to defend

Callender so far as he was connected with the constitution.

Q Was this your sole object?

A It was my chief object. I had determined that if any person should be prosecuted for a violation of the sedition law, to step forward and defend him.

Q. You have said that you referred generally to the law of Virginia, but not particularly. Explain your meaning.

A My meaning was that I did not say "By an act entitled an act, and passed on a particular day it was enacted," but I said that by the laws of Virginia, a defendant was not ruled to trial during the term in which the presentment was made against him.

Q On the subject of colonel Taylor's testimony, did not Judge Chase request Mr. Nelson, the district attorney, to let the evidence go to the jury?

A I think I have some recollection of it, but I cannot state it accurately.

Q Did not Judge Chase offer to postpone the trial of Callender for a month?

A I have heard it said since the trial, but I have not the slightest recollection of any thing of the kind. It would have been the wish of the counsel for Callender to have had the cause postponed. If I had heard the offer, I should gladly have acceded to it.

Q Did the counsel ask for any other postponement but the one until the next term?

A I do not recollect that they did. Judge Chase did offer to postpone it for a day on account of Mr. Giles's abscence.

Q Did the witnesses who were brought forward, express a reluctance to give their testimony?

A They came forward voluntarily.

John Taylor sworn.

Mr. Randolph. We wish you to state what fell under your observation at the trial of Callender, and especially with regard to the rejection of your testimony.

Mr. Taylor. With relation to my testimony being rejected, I was summoned and sworn as a witness in behalf of Callender. When I was sworn Judge Chase asked the counsel for Callender what they expected to prove by the witnesses. I do not recollect the answer, but the judge directed the questions to be reduced to writing, and submitted to the inspection of the court,—this having been done, Judge Chase declared that I should not be examined. I did not give any intimation of what I should be able to prove, either to Callender or his counsel. After Judge Chase declared that I should not be examined, he turned to Judge Griffin and spoke to him, who replied in so low a tone of voice that I was not able to hear what he said.

Q Upon what ground was your testimony rejected?

A The judge said that the testimony was inadmissible, because it would not prove the truth of any charge.

Q Did you observe any thing unusual in the manner of the court?

A The business was commenced with a motion for a continuance. The interruptions of the counsel were frequent, but I do not recollect the expressions used by the judge. The effect of them was a considerable degree of laughter among the audience. I thought the interruptions were in a high degree imperious, satyrical and witty.

Q Was there any thing unusual in the manner of the counsel?

A I did not observe: nor did I see any thing of anger on the part of the court.

Q You have said that the manner of the judge was imperative ; do you mean that it was imperious ? (here the witness hesitated.)

Q Or rude ?

A It appeared to be well calculated to abash and disconcert the counsel, and it had that effect ; for the audience enjoyed considerable mirth at the expense of the counsel, but I did not see the latter laugh.

Q Do you recollect any thing relative to the overuling the objection of Basset to serve on the jury ?

A I do not recollect the expressions of Mr. Basset, but I think he stated that he was opposed to Callender. The judge asked him whether he had any prepossession against the indictment. Basset replied that he had never seen the indictment, and the judge ordered him to be sworn on the jury. In this decision the opinion of Judge Griffin did not appear to have been asked.

Q. You have been a long time in the practice of the law ?

A A few years only ; I believe about seven.

Q Have you ever known a capias to issue in an offence, not capital, and the party to be ruled to trial the same term at which the presentment is made by the grand-jury.

A I answer the question in the negative ; but I have never directed my attention to criminal cases.

Q Has it been the practice for counsel to be compelled to reduce their questions to writing ?

A I never saw it practised as it was in the case of Callender. I have seen it done when questions arose on the question itself.

Q Do you recollect any request of the judge to the attorney, to allow testimony to go to the jury.

A After as much discussion had taken place as I have mentioned, Mr. Chase did express some such idea ; but the attorney expressed his dissent to it. The request was made in a very feeble manner by the judge.

John Taylor cross examined by Mr. Harper.

Q You have said that you considered the conduct of the court as tending to abash the counsel. Did it appear to have been so intended by the court ?

A I thought it was, and that it had that effect.

Q. Did you consider the opinion against the motion for a continuance as made with the concurrence of Judge Griffin ?

A The general appeared to be, to give the opinion without consulting Judge Griffin, but to this rule there were exceptions. I know not whether this was one or not.

Philip Norborne Nicholas sworn.

Mr. Nicholson. Please to state your knowledge relative to the trial of Callender.

Mr. Nicholas. In the month of May, 1800, the circuit court sat in Richmond, and was composed of Judges Chase and Griffin. I believe that Judge Chase sat alone for some time. On the first day of the court, Judge Chase delivered a charge to the grand jury, in which he spoke of offences against the sedition law. The same day the grand jury returned with a presentment against James Thompson Callender, as the author of a book called the "*Prospect before us.*" The indictment was sent up to the grand jury the same day, and a true bill returned. Callender then lived in Petersburgh, and process was issued against him. My impression always has been till lately, that the process was a warrant for his apprehension. It was said for several days that Callender could not be found ; at length, however, he was

found, and brought by the Marshal to Richmond. He seemed very much alarmed, and wished to make some concessions to the court. For several days he was permitted to go at large. Mr. Hay and myself had a conversation with him, and told him we were ready to render him our professional assistance. He stated to us that it was impossible for him to go into a trial this term, and we prepared an affidavit, in which he stated the absence of a number of witnesses, which were material to his defence, and also some books which he had not in his possession, and that his counsel were not prepared for trial, even had the witnesses been present. A motion founded on this affidavit was made for a continuance, and argued, with considerable zeal, by the counsel who appeared for Callender. The principal ground taken was, that by the constitution the party accused had a right to compulsory process, to procure the attendance of his witnesses. The judge did not decide the motion on that day, but gave a strong opinion against it. He said he had no objection to postpone the trial until such of the witnesses as could be procured, during the term, might be brought to court. On the next day we renewed the motion for a continuance, and argued it with considerable zeal, being confident that we could not do justice to Callender if we proceeded to trial that term. Mr. Hay stated the law of Virginia, by which the jury had the right of assessing the fine. Judge Chase said that that was a wild notion, when applied to the courts of the United States, and told the attorney that he need not reply to our arguments, because the affidavit did not state that the witnesses could prove the truth of all the charges, and therefore, that the cause could not be continued. I believe he concluded by ordering the marshal to call the jury. The jury were then called to the book, when they came, I observed that I should challenge the array, because one of the jury had made use of expressions hostile to Callender, and referred as authority to trials per puis. Judge Chase observed that it was not the best authority, and sent for Coke upon Littleton: It having been brought, he cast his eye over a part of it, and observed that the law was clear, and that the array could not be challenged for such a cause, but that we might cause each juror to be examined on oath, as to his expressions. In consequence of this we proceeded to examine the jury. To the following question put by the court, the first juror answered in the negative. It was—"Have you formed and delivered any opinion on the charges contained in the indictment?" Mr. Hay requested the permission of the court to ask the jurors, whether they had ever formed an opinion as to the "Prospect before Us," from which the charges in the indictment were extracted. Judge Chase replied, that his was the only proper question, and that an opinion must be delivered as well as formed. Mr. Hay then requested that the indictment might be read to the jury. Judge Chase refused it, and observed that he had indulged us as much as he could. The eighth juror which was called, was John Basset. I believe he was asked the previous question, and his reply was that he had never seen the indictment, but stated that he wished to be excused from serving on the jury, because he had formed and delivered an opinion that the "Prospect before Us," came under the sedition law. Mr. Chase observed that he was a good juror, and he was accordingly sworn. The evidence on the part of the United States was then called, and a number of witnesses appeared, and among the rest William A. Rind, who had been engaged in printing the book. Mr. Hay observed, that some of the witnesses might criminate themselves, and

that if any of them were engaged in the publication of the work, they were not bound to give evidence. Judge Chaſe obſerved, that the gentlemen was correct as to the law, but if the witneſſes choſe to give evidence, that they might reſt ſatisfied that they would not be proſecuted. The witneſſes were ſworn and Mr. Rind proved that he printed a part of the work. The evidence on the part of the U. States being cloſed, the counſel for Callender wiſhed to examine colonel John Taylor, and he was ſworn in chief. Mr. Chaſe aſked what we meant to prove by that witneſs. We replied, that we did not know exactly, but that we meant to aſk him whether he had not heard Mr. Adams expreſs ariſtocratical ſentiments, and whether Mr. Adams did not while vice-preſident, vote in the ſenate againſt the law for ſequeſtrating Britiſh debts, and the law to ſuſpend the commercial intercourſe between the United States and Great Britain. Judge Chaſe ſaid that we muſt reduce our queſtions to writing. I obſerved that it was a practice unuſual in the ſtate courts, and in the preſent caſe would be extremely improper, becauſe we did not know what colonel Taylor might prove. Mr. Chaſe replied, that his requiſition muſt be complied with, and I accordingly reduced the queſtions to writing—they were as has been ſtated. Mr. Chaſe with conſiderable promptitude declared, that the witneſs could not be examined becauſe he could not prove the truth of the whole of any one charge, upon which colonel Taylor left the court. The evidence being cloſed, the counſel for the United States commented very largely to the jury on the enormity of the offence. After he had finiſhed, Mr. Wirt roſe and addreſſed the court, and obſerved that the ſituation of the counſel for Callender was a very embarraſſing one. Mr. Chaſe told him that he muſt not reflect on the court. Mr. Wirt then addreſſed the jury. He began by obſerving, that by an act of Congreſs, the laws of Virginia were in force in the courts of the United States ſitting in Virginia. That by the common law of England, which had been adopted in Virginia, the jury had a right to decide on the law as well as the fact in criminal caſes, and therefore they had a right to judge of the conſtitutionality of a law. Mr. Chaſe ſaid, "ſit down ſir." Mr. Wirt obſerved that he was going on. Mr Chaſe ſaid, "no ſir, I am going on." Judge Chaſe then read a paper, in which he declared, that obſervations of this kind muſt be made to the court. Mr. Wirt then addreſſed the court, and ſtated that he had not prepared himſelf upon the queſtion, but he conceived the point to be ſettled that the jury had a right of deciding on the law on criminal caſes. Mr. Chaſe ſaid that the jury was to decide the law. Mr. Wirt then ſaid, "if the jury have a right to decide the law, and the conſtitution is the ſupreme law, the concluſion is perfectly ſyllogiſtic, that the jury have a right to determine the conſtitutionality of a law." Mr. Chaſe replied, "a *non ſequitur*, ſir;" upon which Mr. Wirt immediately ſat down. I followed him and was not interrupted by the judge. Mr. Hay followed me, and obſerved, that the jury had a right to decide the law. Mr. Chaſe aſked him whether he meant in civil as well as criminal caſes, becauſe if he did, he was wrong. Mr. Hay replied that he conceived the propoſition to be univerſally true; but that it was ſufficient for his purpoſe if it applied to criminal caſes. He then proceeded a little further, and was again interrupted by the judge. Mr. Hay then ſtoped, folded up his papers and left the court, and we left it at the ſame time. What happened afterwards I know not.

—

Queſtions by Mr. Randolph.

Q. When you ſtated your objections to being compelled to reduce your queſtions to writing, and obſerved that the proſecutor had not been compelled

to do it, what was the reply of Mr. Chaſe?

A. He ſaid that the counſel for the United States had ſtated when he opened the caſe, what he expected to prove by his witneſſes.

Q. Did you hear any offer on the part of the judge to poſtpone the trial for one month?

A. I did not.

Q. Was the diſtrict judge conſulted when the opinions of the court were given?

A. I do not recollect to have heard his voice except when the evidence of colonel Taylor was rejected.

Q. Did Mr. Chaſe uſe rude expreſſions towards the counſel?

A. It is very difficult for me to anſwer that queſtion. I will relate the facts as well as I recollect them. I remember that when the court overruled the teſtimony of colonel Taylor, judge Chaſe made uſe of this expreſſion: "The counſel for the traverſer know the evidence to be inadmiſſible, and wiſh to miſlead and deceive the populace; and they keep preſſing their miſtakes upon the court." He ſeveral times appeared to wiſh to throw the counſel into ridicule. Mr. Hay attempted to prove that the words ought to have been ſet forth in the indictment literally Mr. Chaſe ſaid, "what the gentleman has ſaid is not law, he contends that the extract ought to have been ſet forth in the indictment *verbatim et literatim*. I wonder he had not contended that it ought to be *et punctuatim* alſo." Mr. Hay was contending, that in all the precedents which he had ſeen concerning indictments for libels, that the title of the book was mentioned. Mr. Chaſe ſaid that he remembered the caſe of "*The Nun in her Smock*" where the title was mentioned, but that it was not neceſſary.

Q. You ſay that when the evidence of colonel Taylor was rejected, that judge Griffin concurred. Was his opinion aſked before or after the evidence was declared to be inadmiſſible?

A. It was after.

Q. Did any of the counſel object to any of thoſe opinions being the opinion of the court?

A. Not at that time. I recollect that the morning that Callender was ſentenced, a gentleman roſe and aſked whether that was the opinion of the court; and judge Griffin replied yes.

Q. Were you at the time of the trial of Callender, attorney general of the ſtate of Virginia?

A. I was.

Q. Did judge Chaſe when ſpeaking of you make uſe of the term, "young man" or "young gentleman."

A. I believe he did apply the term "young gentleman" to me. I had forgot upon what occaſion, but upon converſing with Mr. Robertſon, who took the ſtenographical account of the trial. I believe it was when colonel Taylor's evidence was rejected. I think he applied to the diſtrict attorney, and ſaid, that he had been ſo importuned by the young gentleman, that he wiſhed Mr. Nelſon would ſuffer the evidence to go to the jury?

Q. Is it uſual in the courts of Virginia, in caſes leſs than capital, to iſſue a capias and take the party into cuſtody?

A. The practice is to iſſue a ſummons, and I do not recollect an inſtance where a capias has iſſued, in the firſt inſtance. The uſual practice is for the ſheriff to keep the ſummons, and not to ſerve it until juſt before the ſitting of the court, but the party is never ruled to trial the firſt term.

Q. Did the counſel for the traverſer, refer to the law of Virginia?

A. I believe not particularly. Mr. Hay referred to it generally.

Q. Why did not the counſel refer to it?

A. I do not recollect. I had juſt began to practice in the federal court; but I do ſuppoſe that the reaſon was becauſe the judge had expreſſed an opinion that the act of Virginia did not apply.

Philip Norborne Nicholas, croſs-examined by Mr. Harper.

Q. Did judge Chaſe uſe the term "we," as connecting himſelf with the proſecutor?

A. I ſo conſidered it.

Q. Did the witneſſes who were brought forward, and who were concerned in the publication of the book, expreſs any unwillingneſs to give evidence?

A. I believe they did not.

Q. Is it not an uſual thing for the court to promiſe a witneſs that he ſhall not be proſecuted?

A. I never knew an inſtance of the kind.

Q. What cauſed the ſecond interruption of Mr. Hay?

A. I do not recollect.

—

Queſtion by Mr. Randolph.

Q. Was not Mr. Hay interrupted more than twice?

A. He was interrupted a number of times.

—

John Thompſon Maſon, ſworn.

Mr. *Randolph.* It has been conceded by the reſpondent and muſt be acknowledged by every perſon, that the *quo animo* in which theſe tranſactions were done, has an important bearing on the conſtruction to be given to his conduct. I therefore wiſh to aſk this queſtion of the witneſs:—Did you ever hear Mr. Chaſe utter any expreſſions relative to Callender and the counſel at the Virginia bar?

A. I beg leave to obſerve, that I expected to be examined relative to a charge delivered by judge Chaſe to the grand jury at Baltimore, and this queſtion did not occur to me. I have a very indiſtinct recollection of a converſation with judge Chaſe, and it was had in a manner which makes it extremely painful to me to relate it; but as I am under the ſolemn obligation of an oath, I will relate it as well as I recollect. Judge Chaſe preſided at a circuit court held at Annapolis in May, 1800. During the term, a man by the name of Saunders, was tried and convicted for robbing the poſt-office. When ſentence was paſſed on him, and he was taken out of court to receive it, the crowd at the door was ſo great, that we who were in the court houſe could not get out. Judge Chaſe had at that term delivered a farewell addreſs to the grand jury. A converſation took place in the court houſe which was altogether jocular, and I have mentioned it to no human being before. Judge Chaſe aſked me if I had ſeen the "*Proſpect before Us*," I replied that I had not, nor did I ever wiſh to ſee it. He obſerved that Mr. Martin the attorney general of Maryland had ſent it to him, and that Mr. Martin had ſcored the paſſages that were libellous, and that he ſhould carry it to Richmond with him; and that if the commonwealth of Virginia was not utterly depraved, or that if a jury of honeſt men could be found there, he would puniſh Callender. He ſaid he would teach the lawyers in Virginia the difference between the liberty and the licentiouſneſs of the preſs.—Judge Chaſe further obſerved, that he was as great a friend to the liberty of the preſs as any man, but as great an enemy to its licentiouſneſs.

—

John Heath, ſworn.

Mr. *Randolph.* Pleaſe to ſtate any thing which you may know relative to the trial of James Thompſon Callender.

Mr. *Heath.* I was one of the counſel at the bar of the circuit court, but was not concerned for Callender. I had occaſion to apply to the court for an injunction in the caſe of a Mr. John Gordon, at the ſuit of a merchant in Baltimore. The motion which I made was not decided on that day, and I thought I would apply to judge Chaſe the next morning at his chambers. I accordingly went there the next morning for the purpoſe of remonſtrating with him on the propriety

of granting the injunction, and found the judge alone. While I was there, Mr. Randolph, the then marshal of Virginia, came in; he held a paper in his hand, and judge Chase asked him what it was. Mr. Randolph replied, that it was a pannel of the jury to try Callender. Judge Chase then asked him if he had any of those creatures or people called democrats on it. Mr. Randolph paus'd for a moment, and but for a moment, and then replied, that he made no discrimination. Judge Chase told him to look over the pannel if there were any of that description, strike them off. This was after the indictment was found against Callender.

The court then adjourned.

—

WEDNESDAY, February 13.

James Triplett sworn.—Examined by Mr. *Randolph.*

Q. Do you know any thing relative to the trial of Callender?

A. I know of no facts which took place during the trial.

Q. Did you hear any expressions used by Mr. Chase, hostile to Callender either previous to, or during his trial?

A. I travelled in the stage from Dumfries to Richmond in company with the judge, when he was going to hold the court at which Callender was tried. The subject of the "*Prospect before Us*" was introduced, and the book was produced by the judge, and handed to me. I informed the judge that Callender had been apprehended once in Virginia under the vagrant law. Judge Chase replied that it was a pity they had not hanged the rascal.

Q. Were there any other expressions after you got to Richmond?

A. After we had got to Richmond the judge first informed me of the preparements being made against Callender, and that he expected I would have an opportunity of seeing him next day, as the marshal had gone for him to Petersburg. A day or two after this, I saw the judge coming down stairs, and he observed, "the marshal has returned without him, I am afraid that we shall not be able to get the damned rascal this court."

Q. Did you read the book when Mr. Chase handed it to you in the stage?

A. I read but a small part of it.

Q. Were any passages marked?

A. There were some passages marked, but I do not remember what they were.

—

James Triplett, cross-examined by Mr. Harper.

Q. On what day did this last conversation take place between you and the judge?

A. I think it was on a Sunday.

Q. Do you recollect who was in the stage with you?

A. I recollect one person's getting in at Stafford Court-house whom I knew. There were a number of persons repeatedly getting in and out.

Q. Where did the conversation take place?

A. Between Fredericksburg and Richmond.

—

Question by Mr. Nicholson.

Q. When was the first time that you related these conversations, and to whom did you relate them?

A. I recollect to have related them to the late general Mason, soon after my return from Richmond.

—

Question by the President.

Q. Were you acquainted with judge Chase at that time?

A. I was not.

—

John Heath, cross-examined by Mr. Lee.

Q. Were both of your applications for an injunction made at judge Chase's chambers?

A. The first was made in court.

Q. Who then composed the court?

A. I do not recollect whether judge Griffin was on the bench or not.

Q. At what time of the day was it that you went to the judges chambers?

A. It was immediately after breakfaſt, I think it was between 8 and 9 o'clock.

Q. What ſpace of time was you there?

A. I do ſuppoſe it was more than half an hour.

Q. Was the bill of complaint read to judge Chaſe at his chambers?

A. I do not recollect whether I had the bill with me or not. I went to his chambers for the purpoſe of remonſtrating with him on the propriety of granting the injunction. The judge obſerved that it was very extraordinary that Gordon ſhould find equity then in his caſe, when an application had been before made to him in Baltimore and no equity then exiſted.

Q. Who was preſent at the judges chambers when the converſation took place between him and the late marſhal?

A. I do not believe that there was any perſon in the room while I was there except judge Chaſe, Mr. Randolph and myſelf.

Q. Were you there more than once?

A. I was not.

Q. To whom and when did you mention this converſation?

A. I mentioned it immediately I went up to the Swan Tavern to major Hugh Holmes and Mr. Meriwether Jones. I thought myſelf juſtified in mentioning it, not conſidering it a private converſation.

Mr. *Harper*.—Mr. Preſident, I wiſh to make a propoſition which I hope will be acceded to by the managers. It is that John Baſſet be ſuffered to be now examined on the part of the reſpondent. He has informed me that ſince his arrival here he has received advice from his family which renders his preſence indiſpenſible, and wiſhes to be examined and diſcharged.

Mr. *Randolph*.—The managers have no objection to the examination and diſcharge of Mr. Baſſet.

John Baſſet, ſworn on the part of the reſpondent.

Mr. *Harper*. Mr. Baſſet will you pleaſe to relate what took place on the trial of Callender, relative to your being ſworn on the jury.

Mr. *Baſſet*. At the ſeſſion of the circuit court in May, 1800, Callender was indicted for a libel. On the Monday morning on which the trial took place, I left home, which is about twenty miles from Richmond, early in the morning, and arrived in Richmond as ſoon as I could. Upon my arrival there, I ſaw Mr. Randolph the marſhal, who called me, and informed me that I had been ſummoned as a grand juror, and had been noted for not attending, and muſt go to the court and make my excuſe—he added, that as I had not attended on the grand jury, that I muſt ſerve on the petit jury to try Callender. I went to court but the caſe did not come on that day. I therefore attended the next day. I knew the ſedition law was odious to the people of my country, and that a number of them thought it unconſtitutional—I was weak or wicked enough to be a federaliſt. I thought the law conſtitutional, and was determined to do my duty when I ſhould be called on to put it into execution. When therefore I was called on to ſerve on the jury to try Callender, I conceived it to be proper to make a declaration of any impreſſions that I had on my mind, and if it ſhould be an objection to my ſerving, that I might be excuſed; but that if I ſhould be determined to be a proper juror, that I would do impartial juſtice between the traverſer and his country. When, therefore, the previous queſtion was aſked me, I informed the judge of my political ſentiments—I alſo informed him, that I had never ſeen the "*Proſpect before Us*," but that in a newſpaper I had ſeen extracts which were ſaid to be from that book, and that if the extracts were truly taken, that I had formed an unequivocal opinion, that it was a libellous publi-

cation—that I had formed no opinion with relation to the extracts being correct. I alſo informed the court, that I had formed no opinion with reſpect to Callender's being the author of the book or on the charges in the indictment. The court determined that I was a proper juror and I was accordingly ſworn on the jury. After the evidence and pleadings were gone through, we retired to our room to conſult on our verdict and choſe Mr. Bernard Mackham our foreman. The book was then produced, and I informed the jury, that I had never ſeen it before, and wiſhed to have it read through; a number of the jury appeared to diſagree to this, but I ſaid that I would have it read, becauſe the other parts of it might explain the paſſages in the indictment. In conſequence of this the book was read through, and we were in our room about two hours, when we returned into court and delivered our verdict, finding the traverſer guilty. With reſpect to the trial, I will ſtate a circumſtance which made a ſtrong impreſſion on my mind. Judge Chaſe addreſſing himſelf to the counſel for the traverſer ſaid, that when his country made him a judge, they impoſed on him the ſolemn obligation of an oath to execute the laws. That he conceived his opinion to be legal but that he might be in an error and therefore the queſtions might be all reduced to writing in order that a ſuperior tribunal might correct the errors if any ſhould exiſt.

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John Baſſet, croſs-examined by Mr. Randolph.

Q. You have ſaid that you have ſtated to the court, that you had ſeen extracts in a newſpaper, which were ſaid to be from the "*Proſpect before Us.*" After reading the book, did thoſe extracts appear to be faithfully taken?

A. I thought the book more libellous than the extracts, but I have no recollection of the extracts more than the impreſſion made on my mind, that they were libellous.

Q. What time of the morning was it when you got to court?

A. I believe it was juſt after the court was called.

Q. Was the book which the jury took out, delivered to them by the judge?

A. I believe that it was delivered by the proſecutor with the indictment, to ſee whether they correſponded with each other.

Q. Was the indictment read before the jury were ſworn?

A. I do not recollect to have heard it.

Q. Did the indictment contain any of the extracts which you had ſeen in the newſpaper?

A. I do not recollect what were the extracts that I did ſee.

Q. Had the book which was delivered to the jury, any paſſages in it that were marked?

A. I believe it had.

Q. Were any of thoſe paſſages contained in the indictment?

A. I do not recollect.

Q. How did you know that the charges in the indictment, were extracted from the "*Proſpect before Us*"?

A. It was a ſubject of general notoriety.

Q. Did you not believe that the extracts which you had ſeen, were taken from the "*Proſpect before Us*"?

A. I had none but newſpaper authority for it, however, I firmly believed after ſeeing the book, that the extracts were taken from it.

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Queſtion by Mr. Bayard, one of the court.

Q. What was the general conduct of the judge to the counſel, and the counſel to the judge, during the whole courſe of the trial?

A. I think it proper to obſerve, that the impreſſions made on the witneſſes of the tranſaction, will cauſe them to give a different relation to it from each other.

To me the judge appeared to conduct himſelf with deciſion, but without ſeverity; he was at times facetious, but not ſarcaſtical, and he appeared to wiſh that if Callender ſhould be guilty, that he ſhould be puniſhed; if innocent, that he ſhould be acquitted. It appeared to me that the defence which the counſel for Callender attempted to make, was the conſtitutionality of the law, and that they had no hopes of ſaving him except on this ground; and when the judge determined that the law was unconſtitutional, and that they ſhould not addreſs their arguments to the jury on that point, they became extremely mortified. They conſidered that they had a right to go on, and had the cauſe much at heart, and were continually mentioning this point in their argument. Whenever they advanced this poſition, the judge interrupted them, and informed them that the jury had not the power to decide on the conſtitutionality of a law, and that they muſt not argue it to them; their perſevering in this appeared to be the reaſon why they were ſo often interrupted by the judge.

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Queſtion by the Preſident.

When you informed the court that you had formed an opinion on the extracts, did you inform them that you had delivered it alſo?

A. I did not, for I had delivered the opinion to no perſon.

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Queſtion by Mr. Rodney.

Did you not deliver the opinion to the court, before you were ſworn on the jury?

A. It was before I was ſworn in chief.

The court then adjourned.

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THURSDAY, February 14.

The court having met as uſual.

Mr. *Harper*, ſaid that he had a requeſt to make ſimilar to the one made yeſterday—it was that Edmond Randolph, eſq. might be examined on behalf of the reſpondent, and diſcharged.

Mr. *Randolph*, obſerved that the managers did not object.

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Edmond Randolph, ſworn.

Mr. *Harper*. Will you pleaſe to relate what came under your obſervation, at the trial of Callender.

Mr. *Randolph*. I was preſent ſome little part of the trial of Callender, but was abſent the greater part of it.

Q. What was the general conduct of the court and the counſel, in your ſenſe of it?

A. The anſwer which I have already given, is an anſwer to that queſtion. I was abſent a great part of the time, and am not a judge. I left court while a part of the lengthy indictment was reading, and when I returned, the counſel were folding up their papers and retiring from the bar.

Q. Was you in court during the previous motions that were made?

A. I was after the indictment was found. I recollect ſeeing either the clerk or the attorney, handing up a paper to the court, and upon aſking what it was, I was informed that it was a warrant for the apprehenſion of Callender. I was not preſent when the motion for a continuance was made.

Q. What was the demeanor of the court when you were preſent?

A. I cannot commit myſelf on any ſtatement, if my opinion ſhall be allowed as evidence, I am ready to give it, I ſaw nothing that ſtruck me as remarkable in the conduct of the court, I ſaw nothing which conveyed to my mind the idea of corruption in the judge.

Q. What do you mean by corruption?

A. An intention to oppreſs the party.

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George Read ſworn.

Mr. *Randolph*. You are called to ſtate what took place at a circuit court held at New Caſtle in the ſtate of De-

laware, in June 1800, at which Mr. Chaſe preſided.

Mr. *Read.* Several years have elapſed ſince the tranſaction took place, and I may not ſtate the language uſed on that occaſion; I ſhall however ſtate the ſubſtance. The tranſaction of which I am called to give evidence took place at a ſeſſion of the circuit court held at New Caſtle in the ſtate of Delaware, in the month of June 1800. At that court Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States, preſided, and Gunning Bedford, diſtrict judge of the diſtrict of Delaware, was aſſociated with him. Mr. Chaſe, as was the uſual practice, delivered a charge to the grand jury on the firſt day of the term, and they retired to their room. After remaining there ſome time, they returned into court, and upon the queſtions being aſked them by the clerk, whether they had found any preſentments or bills of indictment, they anſwered in the negative. Upon receiving this anſwer, judge Chaſe obſerved as nearly as I can recollect, that he had been informed that a highly ſeditious temper had manifeſted itſelf among a certain deſcription of people in Delaware, particularly in New Caſtle county, and more eſpecially in the town of Wilmington, where lived a moſt ſeditious printer, unreſtrained by any principle of virtue, and regardleſs of ſocial order; that the name of this printer was, but here the judge pauſed and ſaid, "but perhaps it may be aſſuming too much to mention his name, but it becomes your duty, gentlemen, to enquire into it." Several of the grand jury then made a requeſt to the court to be diſcharged, and aſſigned for a reaſon that ſome of them were farmers, and that it was the time of harveſt. The judge obſerved, that the buſineſs to which he had called their attention was of a moſt urgent and preſſing nature, and that he could not diſcharge them until the next day, when further information would be given them on the ſubject to which he had referred them. The judge then addreſſing himſelf to me as the attorney of the diſtrict, aſked whether I had any criminal charge to prefer. I replied that none had come to my knowledge, and that I believed none would accrue; but certainly ſaid the judge to me, "you might make ſome diſcoveries, by making proper reſearches, have you not ſome perſons in this ſtate who have been libelling the government, or the adminiſtration of the government of the United States." I am told ſir, (continued the judge) that there is a printer in the town of Wilmington, who publiſhes a moſt ſcurrilous paper; have you not two printers in that town?" I told him that I believed there was. The judge replied, "one of them is the ſeditious one; I think it a part of my duty and he ſhall be taken notice of—and it is your duty Mr. attorney to examine into affairs of this nature. The times require that this ſeditious temper of the preſs ſhould be diſcouraged and ſuppreſſed. Can you not procure a file of this printer's papers, and between this and to-morrow morning aſcertain whether he has not been guilty of libelling the government. This muſt be done. I think it is your duty." I was rather diſpleaſed at this, and mentioned to the court that I believed I was acquainted with the duties of my office, and was willing to diſcharge them. I mentioned, that I was not in the practice of hunting up offences, that I had not a file of the printers papers, but that if a file was procured me, I had no objection to examine them, and communicate with the grand jury on the ſubject. The judge ſaid, he was ſatisfied with that, and obſerved, that he could not diſcharge the grand jury, but they muſt attend the next day, at the uſual hour. The judge then directed that a file of the papers ſhould be procured for me, and theſe I underſtood to be the papers ſtiled, "*The*

Mirror of the Times, and General Advertiſer." By whom thoſe papers were procured I do not recollect. I examined them in a curſory manner, becauſe I was frequently interrupted during the day, and I did not diſcover any libellous matter coming within the proviſions of the ſedition act. On the next morning when the court met, I ſent the file of papers to the grand jury, believing it to be the wiſh of the judge. At the requeſt of the grand jury I waited on them in their room—on my entering I was addreſſed by the foreman, and my attention was directed to a publication in the "mirror," reflecting on the character and conduct of judge Chaſe. He obſerved there had been a difference of opinion among the jury, whether it was an indictable offence or not. I informed the jury, that the publication did not come under the ſedition law, and was only a libel puniſhable at common law; and that judge Chaſe himſelf had determined in the caſe of the United States againſt Worrell, for an attempt to bribe Mr. Coxe, the commiſſioner of the revenue—that the circuit courts of the United States had no cogniſance of offences committed at common law, and that therefore, they could not preſent the printer for that publication. Nothing further paſſed in the room. The bundle of papers were brought into court and laid on the table. Judge Chaſe aſked me what had been done. I then ſubmitted to judge Chaſe the converſation which I had with the jury, and the obſervations that I had made to them, in which he acquieſced, and the affair was paſſed over in an affable and polite manner on the part of judge Chaſe.

Q. Do you recollect to whom judge Chaſe addreſſed himſelf when he requeſted that a file of the papers might be procured?

A. I do not recollect.

James Lea, Affirmed.

Mr. *Rodney*. Will you pleaſe to relate whether you were ſummoned by the marſhal of Delaware, and ſerved as a grand juror at May term 1800, and what took place at that time.

Mr. *Lea*. I was ſummoned by the marſhal and did ſerve as a grand juror at that term. After receiving the charge from judge Chaſe we retired to our room, and there being no buſineſs before us, we returned into court. The uſual queſtion was then put to us by the court, and anſwered in the negative. After ſome time, judge Chaſe informed us, that he had been informed, that a ſeditious temper had manifeſted itſelf among a certain deſcription of people in New-Caſtle county, and particularly in Wilmington, at which place lived a ſeditious printer who edited a paper called, the "Mirror of the Times and General Adverti-ſer," and was continually in the habit of abuſing the preſident, and it was our duty to enquire into it. He ſaid, that he could not diſcharge us on that day, and that we muſt make diligent enquiry into the ſubject which he had mentioned. Several of the jury informed him, that they had buſineſs of an urgent nature, and wiſhed to be diſcharged. The judge replied, that the buſineſs which he had mentioned was of an important nature, and that he could not diſcharge us until the next day. Some converſation then paſſed between him and Mr. Read, which I do not recollect, and we were diſcharged until the next day. We returned to court the next day, and having been called over by the clerk we retired to our room. A file of the papers was produced and examined, we found nothing ſeditious in it, except ſomething written againſt judge Chaſe, which the attorney when being ſent for, informed us, did not come under the ſedition law. We returned into court and ſome converſation enſued between the judge and the attorney, and we were then diſcharged.

Q. Are you certain that judge Chaſe mentioned the title of the paper?

A. I recollect it perfectly.

James Lea, croſs-examined by Mr. Martin.

Q. How long was the jury up in their room on the firſt day?

A. About an hour, on the ſecond day longer.

Q. At what time does your harveſt commence in Delaware?

A. It was our hay-harveſt, which commences in the month of June.

Queſtion by Mr. Nicholſon.

Q. Is your hay-harveſt conſidered an important one? A. It certainly is.

John Crow, ſworn—examined by Mr. Rodney.

Q. Was you preſent at the circuit court held at New-Caſtle, in June 1800.

A. I was not in court on the firſt day. On the ſecond day I was in court. While I was there, the judges aſked the attorney whether or not the grand jury had found any thing in a file of papers which was lying on the table, worthy of preſentment. The attorney anſwered, that they had found nothing but a piece againſt the judge himſelf. The judge replied that that could not be taken notice of, and ſhortly after he diſcharged the jury.

John Montgomery ſworn.

Mr. *Randolph*. You are called to give evidence concerning a charge delivered by Mr. Chaſe to a grand jury at Baltimore, in May 1803.

Mr. *Montgomery*. It will not be expected that I ſhall detail the charge mentioned by the manager juſt ſat down, in the language in which it was delivered by judge Chaſe. It was delivered at May term, 1803. I was not a member of the bar, but being preſent, I took a chair near the judge, by the ſide of judge Dorſey. The judge addreſſed the grand jury, and it appeared to be from a written paper which he had before him; he proceeded on in the uſual manner, to give in charge to the jury the various duties to be performed by them. After he had finiſhed this part, he mentioned, that he would give ſome few obſervations to them before they retired; that they flowed from a wiſh for the welfare of the com-

munity. He ſtated, that it was important that the people ſhould be truly informed at that criſis, that falſehood was more eaſily diſſeminated than truth, and that the latter was attended to with reluctance againſt popular prejudice. I cannot pretend to ſtate the ſentiments of the judge in the order in which they were delivered, but I can ſtate the ſubſtance. The judge ſaid, that the preſent adminiſtration was weak, relaxed, and not adequate to the diſcharge of their functions, and that their acts ſlowed not from a wiſh for the happineſs of the people, but for a continuance in unfairly acquired power; thoſe laſt words made a ſtrong impreſſion on my mind. When the judge called the attention of the jury, I was prepared to ſomething extraordinary from him, for I had heard his farewell addreſs to the grand jury at Annapolis. The judge ſtated, that a violation of the conſtitution had taken place, by the paſſage of the act of congreſs which repealed the judiciary ſyſtem, and removed the ſixteen judges from office, and that congreſs had made a violent attack upon the independence of the judiciary. The judge alſo found fault with the law which had been paſſed by the legiſlature of Maryland in the year 1801, which went to remove the diſtrict judges of Maryland; he ſaid, theſe acts were a ſevere blow againſt the independency of the judiciary. He ſaid, that ſince the year 1776 he had been an advocate for a republican form of government, that it was his wiſh that freemen ſhould be repreſented by perſons elected by men who had an intereſt with, a property in, and an attachment to the community. I believe he quoted the language of the bill of rights, he found fault with the law which had paſſed the legiſlature of Maryland, which is ſtiled, the univerſal ſuffrage law; and ſaid, that this alſo affected the independence of the judiciary, and I think, he explained it in this manner—that every free white male citizen under the law, poſſeſſing the qualifications of age and reſidence, although he ſhould not have an intereſt, or property, or an attachment to the community, being ſuffered to chooſe their legiſlators, and the judiciary being dependent on the legiſlature for their ſalary and continuance in office, few men of character and abilities would accept the appointment of judges on ſuch tenures. He ſtated, that theſe meaſures were deſtructive of the happineſs and welfare of the community, that they would have a tendency to ſink the government into a mobocracy, the worſt of all poſſible governments; he ſtated, that the framers of the conſtitution of Maryland were men of patriotiſm and ability, and that the names of ſome of them were on the journals of congreſs, and on the journals of the convention of Maryland, that ratified the conſtitution of the United States. And that the ſons of ſome of thoſe men were the chief ſupporters of theſe deſtructive meaſures. He ſtated, that where there were equal laws and equal rights there was freedom, but where the adminiſtration of laws was partial and not certain, the people were not free and that we were approaching to that ſtate of things. He mentioned, that there was but one act remaining to be done, which was the law which had paſſed the legiſlature of Maryland to change the conſtitution, and which was to be approved or rejected by the ſucceeding legiſlature, which went to aboliſh the two ſuperior courts of Maryland, and then there would be nothing in the conſtitution worthy of care or preſervation. At the concluſion of his charge, the judge called on the grand jury to pauſe, and when they returned home, to uſe their utmoſt endeavors to prevent theſe impending evils and ſave their country; that the people had been miſled by miſrepreſentation, falſehood, art and cunning. That by correcting theſe errors, the threatened evils might be averted. I have read the anſwer of judge Chaſe, and will take this opportunity of ſtating a fact contradictory of a part of it. It is where the judge ſays, that at the ſucceeding legiſlature of Maryland, the law for abolithing the two ſuperior courts of Maryland was abandoned by common conſent. It is true, that the law was abandoned by common conſent, but not

for the reaſons aſſigned by the judge in his anſwer. The reaſons of the legiſlature were

Mr. *Harper.* I preſume the witneſs cannot be permitted to ſtate the reaſons of the legiſlature. He may ſtate his own reaſons, but I cannot ſuppoſe that he is competent to ſtate the reaſons of the legiſlature.

The *Preſident.* The reaſons of the legiſlature of Maryland have no connexion with the queſtion before the court, and is not proper evidence to be given to them.

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Queſtions by Mr. Nicholſon.

Q. When judge Chaſe inveighed againſt the law of Maryland, which had aboliſhed the offices of the diſtrict judges of Maryland, had the law gone into operation ?

A. It had.

Q. Had the univerſal ſuffrage law become a part of the conſtitution ?

A. It had.

Q. Was the whole of the charge written or only the latter part of it ?

A. The judge appeared to deliver the whole from a written paper. I However had not my eyes continually on him. I was a member of the legiſlature of Maryland in the year 1801, when the law paſſed, which removed the diſtrict judges and draughted the bill. I was alſo a member of the legiſlature, and draughted the details of the univerſal ſuffrage law ; and I was one of the committee that draughted the bill which contemplated the abolition of the two ſuperior courts of Maryland. I therefore conſidered myſelf pointed at, and whenever I looked round, I could ſee the eyes of the audience fixed upon me. While I was looking round, the judge might not have read from the paper. I did not commit the charge immediately to writing. I had ſome converſation with Samuel Harriſon Smith, the editor of the National Intelligencer, who informed me, that he had taken no notes of the charge. I ſaid that when I returned home, I ſhould commit to writing what I recollected of it. Accordingly when I returned home in about ten or twelve days, I made a ſtatement of it and ſent it to the editor of the Baltimore American, and it was publiſhed in his paper.

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John Thompſon Maſon.

Mr. *Randolph.* We wiſh you to relate ſuch circumſtances as came under your obſervation, in relation to the charge delivered by Mr. Chaſe at Baltimore, in the month of May, 1803.

Mr. *Maſon.* I was preſent when a charge was delivered at that time by judge Chaſe. I came into the court late, but was preſent during the delivery of it. I have an imperfect recollection of the charge. I had not been in Baltimore for two years before. The court-houſe was very full, and a number of my acquaintances preſſed thro' the crowd to exchange civilities with me. I only attended to thoſe parts of the charge, when my attention was not taken up with my friends. I do not think that I can charge my recollection with but three great points in the charge. The firſt was a pretty ſtrong and cenſuring animadverſion upon the repeal of the judiciary ſyſtem by congreſs, and it was ſpoke of as a meaſure calculated to deſtroy the independency of the judiciary. The ſecond was the alteration of the conſti-

tution of Maryland, with reſpect to univerſal ſuffrage. Judge Chaſe ſpoke of this meaſure, as calculated to ſap the foundation of the government. The third was this. An attempt had been made to change the judiciary ſyſtem of Maryland, and a law had paſſed one legiſlature and it required the ſanction of another to make it a part of the conſtitution, which aboliſhed the two ſuperior courts of that ſtate. He ſpoke of this amendment as dangerous in its nature, and that if carried into effect would ſo injure and deface the conſtitution, as to leave little or nothing in it worthy of preſervation. He concluded his remarks in an earneſt recommendation to thoſe to whom he addreſſed himſelf, to prevent the repaſſage of the latter act, ſo as to give it validity. There were in court, at leaſt two gentlemen, whoſe fathers had been members of the Maryland convention who framed their conſtitution. Judge Chaſe obſerved, that it was a ſubject of peculiar concern to him, to ſee ſome gentlemen engaged in demoliſhing that fair fabric which their fathers in conjunction with him, had toiled with ſo much earneſtneſs in erecting. There is one point of fact in which I differ from the witneſs who laſt gave teſtimony. Judge Chaſe did deliver a written charge, yet I have it on my mind, that he made ſeveral extempore remarks, which I conſidered as an enlargement on the written charge.

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Queſtion by Mr. Bayard, a member of the court.

Q. Did the witneſs hear any expreſſions of the judge, about the character of the preſent adminiſtration?

A. I do not recollect to have heard any thing of the kind.

Samuel Harriſon Smith, ſworn.

Mr. *Nicholſon.* Pleaſe to ſtate what you know relative to the charge delivered to the grand jury at Baltimore.

Mr. *Smith.* After a definition of the offences cognizable by the grand jury, judge Chaſe ſaid he hoped he ſhould be pardoned for making a few additional obſervations. He had, he remarked, been uniformly attached to a free republican government, and had actively participated in our revolutionary ſtruggle to maintain it. He ſtill remained attached warmly to the principles of the government, then eſtabliſhed. Since that period however, certain opinions had ſprung up which threatened with ruin the fair fabric then raiſed. It had been contended that all men had equal rights, derived from nature, of which ſociety could not rightfully deprive them.—This he denied. He could conceive of no rights in a ſtate of nature, which was in fact a creature of the imagination, as there was no condition of man in which he was not, under ſome modification, ſubject to a particular leader, or particular ſpecies of government. True liberty did not in his opinion conſiſt in the poſſeſſion of equal rights, but in the protection by the law of the perſon and property of every member of ſociety, however various the grade in ſociety which he filled. Nor did it conſiſt in the form of government in any country. A monarchy might be free, and a republic a tyranny. Wherever the laws protected the perſon and property of every man, there liberty exiſted, whatever the government was. Such ſaid he is our preſent ſituation. But much I fear that ſoon, very ſoon, will our ſituation be changed. The great bulwark of an independent judiciary has been broken down by the legiſlature of the United States, and a wound inflicted upon the liberties of the people which

nothing but their good ſenſe can cure. —(Judge Chaſe here went into an aſſertion of the right of the judiciary to decide on the conſtitutionality of laws.) He then adverted to the proceedings of the legiſlature of Maryland. He commented on the wiſdom and patriotiſm of thoſe who had framed the conſtitution of that ſtate. That wiſdom and patriotiſm had never conceived liberty to conſiſt in every man poſſeſſing equal political rights. To ſecure property the right of ſuffrage had been limited. The convention had not imagined, according to the new doctrine, that property would be beſt protected by thoſe who had themſelves no property. The great rampart eſtabliſhed in the limitation of ſuffrage was now demoliſhed by the principles of univerſal ſuffrage engrafted in the conſtitution. In addition to this, a propoſition was now ſubmitted, whoſe ratification depended upon the next legiſlature, and which if ratified, would deſtroy the independence and reſpectability of the judiciary, and make the adminiſtration of juſtice dependent upon legiſlative diſcretion. If this ſhall, in addition to that which eſtabliſhes univerſal ſuffrage, become a part of the conſtitution, nothing will remain that will be worth protecting. Inſtead of being ruled by a regular and reſpectable government, we ſhall be governed by an ignorant mobocracy. When he reflected on the ruinous effects of theſe meaſures, he could not but bluſh at the degeneracy of the ſons, who deſtroyed the fair fabric raiſed by the patriotiſm of their fathers.

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Queſtion by Mr. Bayard.

Q. Did you hear any thing relative to the character of the preſent adminiſtration?

A. Nothing but what may be inferred from what I have related.

John Stephen, ſworn.

Mr. *Randolph.* Pleaſe to ſtate your knowledge of the charge delivered at Baltimore.

Mr. *Stephen.* I was preſent when a charge was delivered by judge Chaſe to the grand inqueſt at Baltimore, in May, 1803. My recollection is extremely vague and imperfect concerning it, but on the principal points of the charge, it agrees with the other witneſſes. Mr. Chaſe ſpoke upon the act of Congreſs which repealed the judiciary, he ſtated that he was oppoſed to the univerſal ſuffrage bill, and ſaid he was in favor of the principle in the bill of rights. He alſo ſpoke againſt natural rights, and againſt the law which had paſſed one legiſlature of Maryland for the abolition of two ſuperior courts. In the concluſion he recommended to the jury to prevent the paſſage of it. After the time which has elapſed, I cannot undertake to ſay whether judge Chaſe confined himſelf to the paper before him or not. Judge Chaſe declared that the independency of the judiciary had been materially affected by thoſe meaſures.

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Mr. *Randolph* here offered in evidence, a record of the proceedings at the trial of Callender, the moſt material part of which he ſaid was of the iſſuing the capias againſt Callender, and alſo a record of the proceedings in the caſe of Fries; and then obſerved, that the managers here cloſed their evidence, with the reſervation of the right to examine any of their witneſſes who had not yet arrived, and who might come in before the trial ended.

The court then adjourned.

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ERRATUM.

In page 47, firſt col. line 14, for '*unconſtitutional*,' read '*conſtitutional*.'

TRIAL

OF THE

HON. SAMUEL CHASE,

Continued.

Friday, Feb. 15th, 1805.

MR. HARPER.

WE feel, Mr. President, so entire a confidence in the justice and discernment of this honourable Court, and are so strongly impressed with the importance of its time, at this moment, when so much indispensable public business presses on its attention, that nothing but an anxious desire to remove every imputation of misconduct, in a moral, as well as in a legal point of view, which might rest on the character of the honourable respondent, on account of any of the transactions which furnish the subject matter of this prosecution, could induce us to occupy, by adducing testimony on our part, any portion of that time which we know to be so precious. We consider the articles of impeachment as wholly unsupported by the testimony adduced on the part of the honourable managers; and, had we no further object in view, than a mere legal acquittal, we should most cheerfully submit the case, on that testimony.

But, although no legal offence be proved, which could warrant a conviction on any of these articles, yet some parts of the testimony produced in support of them, might, if left unexplained, throw on the conduct of our Honourable client, some shades of impropriety, which it is in our power, and therefore is our duty, to remove.

In the discharge, however, of this duty, our wish to expedite to the utmost, a proceeding which has already occupied so long the attention of this honourable body; and to leave as much time as possible for finishing the important business of the session, restricted in its duration, and now drawn so near to its close, has induced us to wave our privilege of making a full and argumentative opening of our case, a privilege given to us by the usual course of judicial proceedings, and confirmed by the example of the honourable managers, and to confine ourselves to a brief statement of the points to which our testimony will be directed. I request the indulgence of this Honourable court, while I present this statement to its view; after which we shall proceed, with all possible dispatch, in the examination of our witnesses, and the production of our written evidence.

As to the case of Fries, which is the subject of the first article, we shall produce evidence to prove, that the general definition of treason, contained in the paper delivered to the prisoner's counsel by the respondent, had not only been settled by two solemn decisions in the same court, but had been pronounced publicly by Judge Iredell, as the settled law of the land, in his charge to the Grand Jury, by which the first indictment against John Fries was found. We shall then prove more

particularly than has yet been done, the contents of the paper thus delivered, and shall produce the original paper itself.

We shall then proceed to shew, that when the Respondent on the second day of the trial, told the counsel for Fries that they were at liberty to proceed in the defence, in their own way, without being restrained by any thing that had passed on the preceding day, he did not accompany this permission with a menace of any kind, as the learned counsel themselves have supposed, and have stated in their testimony at this bar; but merely informed them that in conducting the defence, they would be subject to no restriction, except that which a regard to his own character ought to impose on every member of the bar: And from hence we shall shew, as applicable to other parts of the case, how little reliance is to be placed on the recollection of angry men, whatever may be their general title to belief.

Proceeding then to the next great subject of accusation, the case of Callender, we shall prove that the copy of the Prospect before Us, which was seen in the possession of Judge Chase, was not marked or scored by him, or with any view to the prosecution of the author, but by a gentleman who had purchased the book for his own amusement, and in reading it had, according to his custom, scored the most remarkable passages, before he knew that the judge was to hold the court at Richmond, and afterwards gave it to him, for his amusement on the road.

We shall then shew that the private conversation which took place at Annapolis between the Respondent and Mr. Mason, as given in evidence by the latter gentleman, was a mere jest, provoked and drawn forth by Mr. Mason himself; whose recollection of the affair we shall prove to be far less accurate than that of a man ought to be, who, at the distance of almost five years, undertakes to adduce at the bar of a court of justice, a transient, jocular, and confidential conversation, in support of a criminal prosecution.

Following the judge then to Richmond, we shall prove, that far from manifesting any desire to procure the punishment of Callender, if innocent, he felt a strong wish for the escape of that miserable wretch, whom he probably considered as the needy and despicable tool of other men's designs; and therefore as the object of contempt and pity, rather than of resentment. We shall also shew that the respondent, instead of wishing to pack a jury for the conviction of this unfortunate and despicable object, was desirous that he might be tried by a jury composed entirely of persons belonging to that party whose cause his book was written to support.

As to the conversation stated by John Heath, to have taken place between the respondent and the then marshal of Virginia, relative to striking off from the pannel of jurors formed for the trial of Callender, "all those creatures called democrats," we shall shew, by the most unquestionable testimony, that no such conversation ever did take place, and that the witness who has stated it was utterly mistaken in all the circumstances which he has stated.

We shall also prove that on the pannel of jurors which actually was formed for the trial of Callender, there were several persons well known to be of the same political opinions which he then supported; and, that if they were not sworn on the jury, it was because for some reason best known to themselves, they refused or neglected to attend.

After establishing these preliminary points, we shall proceed to prove

that the statement, given by the honourable managers, relative to John Basset's supposed objection to serving on the jury, is wholly incorrect: that Basset made no objection, nor expressed any unwillingness to serve, but merely suggested a scruple of delicacy, which he supposed might disqualify him, and on which he wished for the direction of the court: That this scruple was not of such a nature as to constitute a legal disqualification; and that the question propounded to him and the other jurors, was the same which had been adopted on consideration in the case of Fries. On all these points we shall fully corroborate the testimony of Mr. Basset himself.

With respect to the rejection of Col. Taylor's testimony, we shall prove that the respondent, after pronouncing the opinion of the court on that point, offered to state a case for the purpose of submitting the point to the consideration of all the judges of the supreme court, and to grant a new trial if their opinion should differ from his. From which we shall contend that he could not possibly have made this decision, admitting it to be erroneous, through any improper motive.

We shall also prove that although the respondent did not consider himself authorized to grant a continuance in the case of Callender, for which no legal ground was shewn, he did offer to postpone the trial for six weeks or more, in order to accommodate the traverser and his counsel, and also offered to grant them attachments for bringing in such of their witnesses as were within the reach of the court.

As to the conduct of the respondent on this trial, we shall prove that it was marked throughout with a mildness and propriety, little to be expected after the incorrect and irritating behaviour of some of the counsel: A further instance to shew how little attention is due to the statements of angry men, who come in the character of witnesses, to complain of their fancied wrongs. We shall, moreover, prove that on every legal question decided by the respondent, he consulted his colleague Judge Griffin, and merely delivered the opinion of the court; although in settling mere questions of order, he acted from himself, as his duty and authority as presiding judge required. And finally, we shall produce a witness who attended the whole trial, and took down all the proceedings in short-hand; and who will present to the view of this honourable court, an accurate and authentic statement of all that passed.

Proceeding then to the subject matter of the fifth and sixth articles, we shall prove that the judges of the Supreme Court of the United States, acting under the statute for establishing the judicial courts, have never considered the state laws as the rule of proceeding, in cases like that in question; that the provisions of the act of Congress relied on by the sixth article, have always been regarded by those judges as relating to rights acquired under the state laws, and not to process, in criminal cases under the statutes of the United States. That the practice in the state courts of Virginia, under the state law relied on by the fifth article, has been to issue a capias, and not a summons, in cases of misdemeanors punishable by imprisonment, or to be tried on indictment, and to use a summons in those cases only where the offence was to be punished by fine, without imprisonment, and the offender was to be tried by the court in a summary way, without an indictment. And to shew that the recollection even of the most correct men, is not always to be relied on,

we shall produce a record in which it appears, that the gentleman who has given his testimony with so much candor and propriety, and who, though still very young, has been nearly five years attorney general of Virginia, did himself, in his official capacity, order a capias on a presentment, in a case not capital.

And finally to remove all shadow of doubt from this part of the case, we shall prove that when the presentment had been found against Callender, and the respondent was about to order process upon it, he enquired of Mr. Nelson the district attorney, what process was proper in such a case, and was informed by him that a capias was the proper process: whereupon the capias actually issued was drawn up and issued under the immediate direction of that officer; on whom, consequently, and not on the respondent, who had no better means of gaining information on such a point, the blame of the mistake, had one been committed, must have fallen.

On the subject of the repondent's conduct at the circuit court, held at Newcastle, in 1800, which furnishes the matter of the seventh charge, we shall prove that the very improper and unbecoming expressions attributed to him, relative to "a highly seditious temper, manifested by a certain description of people in the state of Delaware, and especially in Newcastle county, and more particularly in the town of Wilmington," were never uttered by him; and that he neither said nor did any thing more than is admitted by him in his answer, and was, as we contend, required by his duty.

We shall then proceed to the subject matter of the eighth article, the charge delivered by the respondent in Baltimore; and there we shall produce a cloud of witnesses to shew that he uttered no such expressions concerning the present administration, their character, their mode of acquiring power, and their objects in its exercise, as are attributed to him by Mr. Montgomery; and that he neither mentioned the present administration, nor alluded to them, except so far as they might be implicated in his remarks on the effects likely, in his opinion to flow from the repeal of the judiciary act. I have no hesitation, Mr. President, in declaring, that if the respondent had utterred on such an occasion, such expressions as this witness has put into his mouth, such conduct, though not amounting to an impeachable offence, would have been highly improper, and deserving of severe reprehension. Hence we feel particularly solicitous to refute this accusation, and happily we have it most completely in our power: for we shall not only shew, that of the members who were present, and attended particularly to this charge, not one person, except Mr. Montgomery, heard these expressions; but we shall prove by various witnesses who were near to the respondent, and observed him particularly while delivering the charge, that he read it from a written paper, and delivered nothing but what he so read: and, to make refutation complete, we shall produce the paper itself, attested by the person who copied it, and those who heard it read, and shall submit it to the consideration of this honourable court, which will find in it no such expressions as are stated by Mr. Montgomery.

Such, Mr. President, is the statement of what we expect to prove, and this statement we shall now proceed to substantiate by our testimony.

Evidence on the part of the Respondent.

Samuel Ewing, sworn, and examined by Mr. Hopkinson.

Q Is that paper in your hand writing? *(producing one)*

A It is, except the concluſion of a particular paragraph.

Q At what time did you make it?

A It was copied from a paper thrown down by the court on the bar table at the trial of Fries. In the afternoon of that day, while I was in the office of Mr. Lewis, with whom I then ſtudied, Mr. Caldwell, the clerk of the court, called on and aſked me for it, and I gave it to him, and I have never ſeen it ſince until a few days ago.

Q Was you in court the next day, and what took place?

A After I had been in court a few minutes, judge Chaſe mentioned that the counſel were wrong as nothing which had fallen from the court as a reſtriction—and aſked the counſel whether they meant to go on. The converſation ended with a determination on their part not to proceed with the defence. Judge Chaſe obſerved, that after the court had explained their minds on the law, that if the counſel ſtill perſiſted in citing caſes which were not law, they muſt do it at the riſk of their legal reputation. I did not underſtand this as a menace on the part of the judge.

Edward J. Coale, ſworn, and examined by Mr. Hopkinſon.

Q Is that paper *(ſhewing him one)* in your hand writing?

A It is. This is a copy of a paper given to me by judge Chaſe, to copy for him, and was made previous to the trial of John Fries. I had read law in Baltimore under the direction of judge Chaſe, and when I reſided in Philadelphia he occaſionally ſent for me to copy his opinions, while he held a court there. This paper was copied from one in the hand writing of judge Chaſe.

Q What were the reaſons aſſigned by the judge, when he gave you this to copy?

Mr. Nicholſon. I object to that queſtion. I do preſume that the reſpondent cannot give any converſation of his in evidence.

Mr. Hopkinſon. Declarations are always admitted to ſhew the intent of the act. We have heard much of the quo animo of the judge and we wiſh now to ſhew it.

Mr. Nicholſon. Evidence may be given of declarations, which operate againſt the party making them, but not in his favor, unleſs made at the ſame time. This I take to be the rule of law.

Mr. Martin. I know that declarations themſelves cannot be given in evidence in favor of the party making them, but when the declarations accompany the act it becomes a part of that act, and is proper to be given in evidence. Such is the caſe at preſent and I hope the queſtion will be allowed to be put to the witneſs.

Mr. *Rodney.* I conceive that no declarations of the party can be given in evidence in his favor. If that doctrine were correct, to what inconceivable miſchiefs would it lead us. The greateſt criminal, when indicted for any act, might offer his own declarations to ſhew his intent to be pure. For myſelf I could wiſh that every latitude might be allowed the reſpondent in his defence, and I ſhall never object to any queſtions being put; but when an objection is made to one by an honorable manager, it becomes my duty to throw in my mite againſt the queſtion.

The queſtion was then reduced to writing and the queſtion taken upon allowing it to be put to the witneſs and determined in the negative—Yeas 9—Nays 25.

Mr. Hopkinſon here offered, in evidence, a certificate of the clerk of the circuit court of Pennſylvania, ſhewing the number of civil cauſes on the docket at the time of the trial of Fries, and a part of the charge of judge Iredell, delivered to the grand jury, who found the firſt bill againſt Fries, and alſo the caſes of Vigol and Mitchell, reported in Dallas.

William Rawle, examined by Mr. Hopkinson.

Q Was the reſtriction, which was laid on the counſel at the trial of Fries, applied to the counſel for the United States as well as the counſel for Fries?

A I have no recollection of any other reſtriction. I did conceive it laid on both, and that the counſel. on neither ſides ſhould attempt to miſlead the jury. That the counſel for the United States ſhould not cite caſes which deſtroyed the ſalutary proviſions of the ſtatute of William, as that of diſpenſing with the neceſſity of having two witneſſes to prove an overt act of treaſon, and that the counſel for the priſoner ſhould not cite common law caſes concerning treaſon.

William Meredith, ſworn.

Mr. Hopkinson Pleaſe to relate what came under your obſervation at the trial of Fries.

Mr. Meredith. On the 22d day of April 1800, I went to the court houſe at a late hour. As I approached the houſe I met a number of perſons and the impreſſion on my mind was that the court had adjourned. But meeting none of the bar, I went into court and found it ſitting. Soon after I went in judge Chaſe obſerved that the court had conſidered the overt acts charged in the indictment againſt Fries, and had made up their minds as to the conſtitutional definition of treaſon; and to prevent miſtake, had cauſed three copies of their opinion to be made out by their clerk—the paper was then thrown down on the table. I recollect that at this time judge Chaſe obſerved, that the giving this opinion was not intended to prevent the counſel from arguing the law. I felt a deſire to take a copy of the paper but I had no opportunity of doing it. The court adjourned a ſhort time after this. When I was at home an application was made to me by Mr. Caldwell, the clerk, for the copy which he had heard I had taken, but I informed him that I did not take one. On the following day I was in court at the opening of it. John Fries was placed at the bar, and the judge enquired of the counſel whether they were ready to proceed with his trial. Mr. Lewis obſerved that he declined acting any longer as counſel for the priſoner. Judge Chaſe ſaid that the counſel were not to conſider themſelves bound by the opinion of the court which had been delivered the day before. Mr. Lewis referred to the opinion, and ſaid that it in fact precluded the counſel from addreſſing any arguments to the court. Judge Peters ſaid that the opinion was withdrawn. Judge Chaſe obſerved that the counſel were at liberty to argue the caſe fully, both as to the law and fact, before the jury. Mr. Lewis then ſtated to the court his idea of the appoſiteneſs of common law caſes, judge Chaſe ſtated his belief that they were inapplicable but he remarked that the counſel might go on and cite them to the jury as it was not the intention of the court to circumſcribe them in their defence or to take the deciſion of the law from the jury He ſtated farther, that the counſel might manage the defence in any way, having at the ſame time a regard to their own characters. I am poſitive as to thoſe expreſſions, becauſe I made a ſummary of theſe proceedings and they were in the ſtatement. Judge Peters made ſome remarks calculated to put the counſel in a good humour and induce them to proceed; but they perſiſted in declining. Thus far the court manifeſted a conciliatory diſpoſition towards the counſel, but when it was perceived that they would not proceed with the defence of Fries, judge Chaſe told them. "If you ſuppoſe, you will embarraſs the court gentlemen, by ſuch conduct, you are miſtaken," or words to that effect. He then addreſſed himſelf to the priſoner and aſked him if he was ready for his trial, or would have other counſel aſſigned him. Fries obſerved that he did not know what to do, but would leave it to the court. Mr. Rawle then expreſſed a wiſh that the trial might be poſtponed until the next day, which was accordingly done. On the following morning Fries was again placed at the bar, and was aſked whether he wiſhed other counſel aſſigned him. He declined having counſel and obſerved that the court ſhould be his counſel. Judge Chaſe then ſaid in the moſt pathetic and impreſſive manner "Then by the bleſſing of God the court will be your counſel, and will do you as much juſtice as thoſe who were aſſigned you." The trial then proceeded. I was was not there the whole time of it.

Question by Mr. Hopkinson.

Did not Judge Chase take particular pains to inform Fries of his right to challenge and cross-examine the witnesses, and reminded not to ask any question that might criminate himself?

A. I thought Judge Chase's promise to Fries very well, to wit: That of being his counsel. He appeared to take uncommon pains to prevent Fries from asking any question that might criminate himself, and to remind him of his right to challenge, and examining the witneses produced on the part of the United States.

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Luther Martin Sworn.

Mr Harper. Will you please to state whether and at what time you furnished judge Chase with the "*Prospect Before Us,*" and whether there was not a number of passages scored in it by yourself.

Mr Martin. I was in New York during the sitting of the circuit court there. While I was sitting at the bar, I observed in a newspaper that the "*Prospect Before Us*" was advertised to be sold at Greenleaf's printing office. Having never seen it, I went to the office and purchased a couple of them. Judge Washington was then holding the court at New York and informed me that he had never seen the book and I offered him one of mine; but he sent his servant and purchased one. I then read the book, and as in my usual custom scored whatever passages I thought remarkable, either for merit or demerit, and in this case I scored a number of them. At that time I did not know that judge Chase was to hold a court at Richmond, nor were the passages scored with any intention to be used in a prosecution. There were passages scored which could not have been used in the indictment, because I scored all those which reflected on the character of General Washington. When I returned home and found judge Chase was going to Richmond, I gave him the book and observed that he might amuse himself with it on the road, and afterwards make what use of it he pleased. I did detest the book.

Q Was your name written in the book?

A. It was on the title page of it.

James Winchester sworn.

Mr. Harper. Judge Winchester, will you please to state whether you were not in Annapolis, in company with Judge Chase and Mr. Mason, when a conversation took place relative to the "*Prospect Before Us,*" and what was the nature of that conversation.

Mr. Winchester. I attended in May, 1800, at Annapolis, as a district judge, and held the circuit court there in conjunction with judge Chase. I think on the last day of the term, a man by the name of Saunders was sentenced to be whipped, for breaking open a letter in the post-office. When he was taken out of court to receive his sentence, a crowd gathered at the door and prevented the passage of the court out of it. I do not remember what persons remained in court. While the judges remained on their seats, Mr. Mason came up and addressed himself to judge Chase. After such a lapse of time my recollection must be very imperfect, and I shall use my own language in stating what I recollect. I think the conversation took place in this way. Judge Chase had delivered what has been called his farewell charge to the grand jury.—Mr. Mason observed, "Well, judge, what do you call this charge? Is it a moral, a political, a religious or a judicial one?" Judge Chase replied that he believed that it was a little of all. I think Mr. Mason informed the judge that he would not deliver such sentiments in Virginia. It appeared to me that judge Chase thought he meant to say that he would be afraid, and he said that he would not only deliver such sentiments, but would execute the law as he declared it. The conversation then turned on the subject of the book called the "Prospect Before Us," and it was spoken of as a book written by Callender. The conversation which passed concerning it I do not recollect more than this, that I have a strong impression that judge Chase said that Mr. Martin had given him the book, and that he should take it with him to Richmond. I heard the testimony given in a few days ago by Mr. Mason, and my testimony corresponds with his in this particular, that the whole conversation was of a jocular nature; but I do not remember particulars

expreſſions that he does; ſuch as the judge's obſerving, that if the ſtate of Virginia was not wholly depraved, or if there were an honeſt jury to be found in it, that he would puniſh Callender. But my attention was not directed to the whole of the converſation which took place, and thoſe expreſſions might have been uſed by judge Chaſe without my hearing them.

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William Marſhall ſworn.

Mr. Harper. Pleaſe to relate to this honorable court, at what time you ſaw judge Chaſe, after his arrival in Richmond, and what took place at the trial of Callender.

Mr. Marſhall. On the 21ſt of May, judge Chaſe arrived in Richmond. Immediately after his arrival I waited on him, and he aſked me (being the clerk of the court) concerning the ſtate of the docket, and I gave him information concerning it. On the 22d of May the court met, and judge Chaſe charged the grand jury. On Saturday, the 24th, they returned with a preſentment againſt James Thompſon Callender as the author of a book called the "*Proſpect Before Us.*" I believe that the grand jury had prepared the preſentment before the court opened, and as ſoon as it opened they made it. As ſoon as I had read the preſentment, the marſhal carried the jury back to their chamber, and the attorney went to prepare the indictment. There was ſome converſation between judge Chaſe and the attorney, and then judge Chaſe enquired what was the proceſs proper to be iſſued on the preſentment. Mr. Nelſon anſwered, that he ſuppoſed a capias was. Judge Chaſe ſaid ſomething about a bench warrant, which was unknown to us. Judge Chaſe then obſerved, that all three of us, muſt draw a form of arreſt, and the one which he moſt approved of ſhould be uſed. I finiſhed mine firſt, and the judge approved of it and ordered me to put the ſeal of the court to it and deliver it to the marſhal, which I did.—On Saturday evening the grand jury bro't in the indictment. Judge Chaſe formed the court from the 22d to the 29th of May incluſive, alone—on the 30th judge Griffin arrived. On the 27th the marſhal brought Mr. Callender into court in cuſtody. A chair was handed to him, and he remained in court. In the evening judge Chaſe obſerved, that perhaps Callender might have ſome application to make to the court. I do not recollect whether the gentleman who afterwards appeared for Callender were then in court; if they were, they ſaid nothing. Mr. Merewether Jones informed the court, that Callender was not prepared to make any application, but that one would be made the next day. Judge Chaſe aſked if Callender could give bail. The reply of Mr. Jones was, that he could in a moderate ſum.—Judge Chaſe then aſked Callender what he was worth, who replied that he was about equal. The judge did not appear to underſtand him, and aſked what he meant by it. Callender ſaid that he had no property, and that he owed about two hundred dollars. That he had more than that owing to him, but did not expect to receive more of it than what he owed, ſo that he did not conceive himſelf worth any thing. Judge Chaſe aſked whether he could procure bail in the ſum of two hundred dollars. The reply was in the affirmative, and a recognizance entered into—Callender in the ſum of two hundred dollars. and two ſureties in the ſum of one hundred dollars each. On the 28th an application was made to the court, by Mr. Hay, for a continuance of the cauſe. He ſtated to the court that he was not well acquainted with the practice in the circuit courts, but that he had prepared a general affidavit, ſtating, that the traverſer was not prepared for trial on account of the abſence of material witneſſes. Judge Chaſe told him that he had better file a ſpecial affidavit, and might take until the next day to prepare it. He alſo obſerved that it was neceſſary for the traverſer to plead to the indictment, before any motion for a continuance could be made, as he might plead guilty. Mr. Hay aſſured the court that that would not be the plea.—Callender was however arraigned and plead not guilty, and nothing further was ſaid on the ſubject on that day. On the 29th Mr. Hay produced his ſpecial affidavit. The affidavit ſtated that a variety of witneſſes were abſent, who were material to the defence of the traverſer—that there were a number of written documents and alſo a book written by Mr. Adams entitled, *An Eſſay on the Canon and Feudal Laws,*" which were alſo neceſſary for his defence and without which he could not ſafely go to trial; he therefore moved for

a continuance. Judge Chaſe obſerved that every perſon indicted for publiſhing a libel & intending to prove the truth of his aſſertions by documents, ought always to have thoſe documents in his poſſeſſion. That the affidavit was not ſufficient to procure a continuance, but that they ſhould have time to procure the attendance of their witneſſes. He ſaid that the court would laſt for two weeks, but that would not be ſufficient, he would give them a month: "Nay gentlemen (ſaid he) "I will give you ſix weeks." I cannot remain here ſix weeks, becauſe I am bound to hold a court in Delaware, but I will go to Delaware and hold the court, and return here in ſix weeks and try Callender. In the courſe of Mr. Hay's obſervations he ſaid that he was not prepared to inveſtigate the law and the facts, when judge Chaſe made the offer which I have mentioned; I do not recollect that any reply was made. Judge Chaſe then obſerved that the trial ſhould come on at ſuch a time, as the witneſſes who lived in Virginia could have time to attend, and aſked the marſhal concerning the reſidence of Mr. Giles and General Maſon, and whether he had any deputies in court who could be ſent after them.—The reply was that a deputy marſhal was there, who could go after them immediately. Judge Chaſe then directed me to iſſue ſummonſes for the witneſſes, returnable on Monday the ſecond of June. I accordingly iſſued ſubpœnas for general Maſon, Mr. Giles and colonel Taylor. The marſhal was directed to uſe all expedition, and on Monday the ſubpœnas were all returned executed, with the memorandums when they were done. On Monday morning colonel Taylor appeared in court; the others did not. A poſtponement was aſked by the counſel for Callender for two hours, in hopes that Mr. Giles would arrive.—Judge Chaſe informed them that they might have a poſtponement until the next day, which was taken. On Tueſday morning a motion was again made, founded on the affidavit for a continuance.—Judge Griffin was then in court, having come in on the 30th of May. The motion was argued at length and received the ſame deciſion it had before, and the marſhal was ordered to call the jury—twelve jurors appeared when called. Some objection was made to the pannel of the jury. Authority was called for, and I went up in the capitol and brought down Coke upon Littleton. Judge Chaſe looked at it and decided that the pannel ſhould not be quaſhed. When the jury had all anſwered, the counſel propoſed to propound a queſtion to them, I do not recollect what it was. Judge Chaſe obſerved that he would propound the proper queſtion to them, and he aſked them the following queſtion: "Have you formed and delivered an opinion on the charges in the indictment." The anſwer of the firſt juror was, that he did not know what the indictment was. Eight or nine jurors anſwered in the ſame manner, and the counſel declared it unneceſſary to put it to the ſubſequent ones. I cannot ſtate all the circumſtances of the trial. Colonel Taylor's evidence was rejected.

Queſtions by Mr. Harper.

Did any converſation take place between judge Chaſe and yourſelf relative to the ſummoning of the jury, and did not judge Chaſe expreſs a wiſh that Mr. Giles might be on the jury?

Anſwer. Mr. Giles was a juror in the circuit court on the 29th May. When his name was called over to record the verdict, judge Chaſe aſked me whether that was Mr. Giles the celebrated member of Congreſs; I told him that it was. On that evening I was at the lodgings of the judge, and he aſked me whether Mr. Giles would remain in Richmond until the trial of Callender. I informed him that I expected he would not. He ſaid he wiſhed that Mr. Giles ſhould be on the jury, and added, that if his ſituation would permit him to drop a hint to the marſhal, that it would be to ſummon a jury to try Callender, compoſed entirely of Callender's political friends, but that it would be improper for him to interfere.

Q. Was you at any time at the lodgings of Judge Chaſe, when Mr. Heath was there, and what paſſed at that time?

A. Judge Chaſe was a total ſtranger in Richmond, and aſked me to call on him as often as I poſſibly could. I generally went every evening after the court roſe, and I believe I went every morning and accompanied him to court. One day, about ten o'clock, I went to his lodgings, and found Mr. Heath there, who was either at the door, or in the paſſage, in the act of leav-

ing the houſe. I am not poſitive whether Mr. Randolph, the marſhal, was with me; but my opinion is, that he was. I am poſitive that he went with the judge and myſelf to court on that day; becauſe I recollect expreſſing my ſurpriſe to him at finding Mr. Heath there, and aſked him how judge Chaſe, who was a ſtranger in Richmond, could be acquainted with Mr. Heath.

Q. You ſay that Mr. Heath was in the act of leaving the room?

A. He was either out of the room, or in the act of coming out.

Q. Did any converſation take place between judge Chaſe and the marſhal, concerning the ſummoning of the jury, while Mr. Heath was there?

A. There was not one word took place while Mr. Heath was there, and none of that kind ever took place in my preſence.

Q. When the witneſſes who were ſummoned did not attend, did not judge Chaſe offer to iſſue attachments?

A. He did, returnable immediately.

Q. Did not judge Griffin concur with judge Chaſe in all his opinions?

A. I ſat near the judges, and frequently heard them in a low converſation, but I recollect nothing diſtinctly, except when Mr. Baſſet was directed to be ſworn on the jury, judge Chaſe aſked him "whether he had formed and delivered an opinion on the charges in the indictment"—to which Mr. Baſſet replied in the negative. Judge Caſe then obſerved to Mr. Griffin, that this was ſimilar to a murder—That a man might make up his mind as to what conſtituted murder; but that if he did not apply it to the particular caſe, that he was a competent juror; and then directed Mr. Baſſet to be ſworn, to which judge Griffin aſſented.

Q. Did this precede the deciſion?

A. I can't ſay with certainty. Judge Griffin was conſulted as to the rejection of colonel Taylor's teſtimony, and I underſtood him to aſſent to all the acts of the court.

William Marſhall croſs examined.

Queſtions by Mr. Nicholſon.

At the time when Callender was tried, was it not cuſtomary for the circuit judges to change?

A. It was.

Q. Who preſided at the next term after the trial of Callender?

A. Judge Patterſon.

Queſtions by Mr. Randolph.

You ſay you are not certain that the marſhal accompanied you to the lodgings of Mr. Chaſe when you ſaw Mr. Heath there; are you certain that he accompanied you and the judge to the court?

A. I am poſitive.

Q. You mentioned that the judge expreſſed a wiſh that the jury to try Callender ſhould be of a certain political deſcription; did you mention that to the marſhal?

A. I never did.

Q. Do you not know that all the jury who tried Callender, were oppoſed to him in political ſentiments?

A. I believe they all were.

Q. Did the capias which iſſued againſt Callender, iſſue before the bill was found.

A. It did.

Q. In the courſe of the trial, were not the interruptions of counſel more frequent than you have ever ſeen at any other trial?

A. I have rarely ſeen a trial where the interruptions were ſo frequent.

Q. Do you recollect any caſe?

A. I recollect a caſe where judge Iredell preſided, when the interruptions were more frequent.

Q. Did you ſee any thing diſreſpectful on the part of the counſel?

A. The counſel for the traverſer appeared to be in a great ſtate of irritation, and there appeared as much deciſion on the part of the court as I have ever witneſſed.

Q. Was there much warmth diſplayed?

A. There was; but I am unable to ſay who commenced it.

Queſtion by Mr. Martin.

What produced the interruptions of the counſel?

A. I cannot give a diſtinct anſwer to

that queſtion. I frequently heard the judge ſay that the gentlemen had miſtaken the law, and were preſſing their miſtakes on the court.

Queſtions by Mr. Harper.

You have ſtated, ſir, that there were not on the jury any of the ſame political ſentiments with Callender; was there none ſummoned on the pannel?

A. There were ſeveral that I know of: ſome of them ſpoke to me to get them excuſed, but I declined interfering. Col. Harvie was excuſed on account of his being ſheriff of Henrico county court, which was at that time ſitting. Mr. Rudford and Mr. Vandevall were called, but did not anſwer, nor attend.

Q. Did judge Chaſe obſerve, that the gentlemen continued to renew motions after they had been overruled?

A. I think he did.

Q. Was judge Chaſe ſarcaſtic?

A. I do not recollect that he was.

Q. What was the illuſtration of a caſe which he made, and which produced mirth?

A. The judge ſaid that all the charges in the indictment muſt be proved, or it was uſeleſs to prove any; and therefore it was unimportant that any of the traverſer's witneſſes ſhould be there, provided they could not prove all. He ſaid, "Suppoſe a man ſhould ſay that I was a ſcoundrel, a rogue, and an ugly fellow; he is indicted for it, and pleads not guilty. On the trial he proves that I am a very ugly fellow, will any man ſay that this will juſtify him for ſaying that I was a ſcoundrel and a rogue?" All this was in good humor.

Q. Was he harſh to the counſel?

A. The judge frequently ſaid, "I am acting under an oath, and bound to give my opinion on the law; but I am a fallible man, and it is poſſible that I may be in an error, and therefore the whole caſe may be ſtated in writing, and I will aſſiſt the counſel in making out a writ of error, and allow them to take the caſe up to the ſupreme court as ſoon as poſſible.

Queſtions by Mr. Randolph.

Do you ſpeak of colonel John Harvie, of Belvidere?

A. I do.

Q. Do you ſpeak of his politics now, or his politics then?

A. His politics then—common report—and my knowledge of his oppoſition to the ſedition law.

Q. Is the William Rudford the perſon who keeps the Eagle tavern in Richmond?

A. The ſame.

Q. Do you ſpeak of his politics now, or his politics then?

A. I ſpeak of his politics then.

Q. Do you not know that Marks Vandevall has denied that he was ſummoned?

A. I have underſtood it, but not from him.

Q. Did col. Harvie anſwer when called?

A. He did—and was excuſed on the ground of his being high ſheriff of Henrico county, whoſe court was ſitting.

Q. Is there not a great deal of buſineſs tranſacted in Henrico court?

A. There is at the quarterly court, but that was a monthly court, at which there is not much buſineſs tranſacted.

Q. Are you well acquainted with col. Harvie and Mr. Rudford?

A. I am.

Q. Are you well acquainted with Marks Vandevall?

A. I am not very intimate with him.

Q. Do you not know that Marks Vandedall, at the election for members of the houſe of repreſentatives in the ſpring of 1799, voted for your brother, the preſent chief juſtice of the United States?

A. I believe that he did not vote at all. Had he voted, my opinion is that he would have voted for my brother.

Queſtion by Mr. Bayard.

Had the *venire facias* iſſued to ſummon the jury before your meeting with Heath?

A. A *venere facias* did not iſſue at all. An order was given to ſummon the jury on the Thurſday previous to the trial. I do not remember whether the pannel was prepared at the time I ſaw Mr. Heath at the lodgings of judge Chaſe, or not.

Question by Mr. Randolph.

Do you know the politics of Thomas Tinsly?

A. I do not know what politics he professes. I know he was opposed to the adoption of the constitution of the United States.

The court then adjourned.

SATURDAY, February 16, 1805.

David M. Randolph, sworn and examined by Mr. Harper.

Q. Was you marshal of the district of Virginia at the trial of Callender?

A. I was.

Q. In what mode was the jury summoned to try him?

A. I received notice on Thursday, the 29th of May, to summon a jury to try Callender on Monday, the second of June. I proceeded to summon them immediately; but did not complete the pannel until after the court had met on Monday.

Q. Did you ever shew the pannel to judge Chase?

A. I never did in any case that I recollect of, except the pannel of the grand jury, in order to appoint a foreman.

Q. Did judge Chase ever tell you to strike off a certain description of people "or creatures" called democrats?

A. Never at any time or place I am certain. The pannel was never completed until after the court met on Monday, and I had no opportunity of shewing it to judge Chase, even had I wished to do it.

Question. Did any gentleman apply to be excused from serving on the jury?

Answer. Several. At the moment when I received orders to summon the jury, I applied to my two deputies and directed each of them to summon such characters as I designated to them. They proceeded to summon immediately, and each put down one, two or three names. I looked around and summoned several gentlemen, but did not put down their names. On Monday when the court met, finding that my deputies had not summoned as many jurors as was necessary, I went down to look for them, and found them in the act of looking out for jurors. Mr. Mosby, one of my deputies was then in conversation with colonel Vandevall. At this time I saw Mr. Basset coming into town —I went up to him and informed him that he had been noted for not attending on the grand jury and that he must serve on the petit jury, and he would then have an opportunity of making his excuse to the court for not serving on the grand jury.— When I returned to the capitol my deputies made a return of a number of jurors which they had summoned, on little slips of paper, and from them I made out the pannel. Mr. Lewis and Mr. Blakely applied to me to be discharged. I heard something on the part of Mr. Lewis that he was prejudiced, and I discharged him. Mr. Blakely was under the age of twenty-five, and we let him off. I went out and saw Mr. Samuel Morse, and summoned him. He applied to be discharged, but I refused. He then told me that he knew I would let him off, and stooping down assured me that he was prejudiced against Callender. I informed him that I would let him off, but requested him not to mention it, least others might feign the same excuse. I then went down to the counting room of Picket, Pollard and Johnson, and informed Mr. Pollard that he must serve. He informed me that he had been summoned, but could not attend. I told him that there was but one reason which would induce me to excuse him, and he not giving that I refused to discharge him; he then went up to the court and they excused him. Colonel Harvie requested to be let off and informed me that he was high sheriff of Henrico court which was then sitting. I told him that the high sheriff generally did nothing at court, and he must serve: he then applied to the court and was released. Mr. Rudford was in court and made some objection to serving. He might have said that he differed in politics with me. When he was called he did not answer.

Q. Did you go in person and apprehend Callender?

A. I did,

Q. Did you meet with Mr. Hay in Petersburgh?

A. I did.

Q. Was there any thing said, tending

to diſſuade you from apprehending Callender.

A. I had proceeded twelve miles above Peterſburgh in conſequence of wrong information. On my return Mr. Hay came up to me and we entered into converſation. I told him that I had been foiled in my endeavors to find Callender, but that I was determined to ſee whether he was not in Peterſburgh. Mr. Hay appeared to intereſt himſelf in perſuading me to abandon the purſuit. I replied that I ſhould do my duty. He ſaid that he did dot know where Callender was, but that if he did he would not tell me, and added that Callender could not or would not be taken that term—I told him that perhaps he was too ſanguine and he muſt not be ſurprized if I carried Callender to court with me. He then politely aſked me to go to his houſe and lodge, which I refuſed, wiſhing to ſee ſome of my friends in Peterſburgh.

Q. Did Mr. Hay aſſign any reaſons for your abandoning the purſuit?

A. He offered a number; one was that Callender, if taken, could not be defended, and would be impriſoned, but that if not taken at that time, at the next court he would ſurrender himſelf.

Q. You have ſaid that you completed the pannel after the meeting of the court?

A. I have ſaid ſo.

Q. Did you ever ſubmit any other pannel to judge Chaſe except the pannel of the grand jury?

A. I never did.

David M. Randolph, croſs examined by Mr. Randolph.

Q. Did you ſummon Marks Vandevall yourſelf or not.

A. He was not ſummoned by me, but he was by my order. Mr. Moſby my deputy told me that colonel Vandevall was averſe to ſerving. I told him that it lay with him to let him off, and he informed me that he had not.

Q. Have you not heard that Mr. Vandevall has denied that he was ſummoned?

A. I have ſeen it in a newſpaper and called Mr. Moſby's attention to it, who ſaid it was unfounded.

Q. Had you any converſation with Mr. Chaſe on the ſubject of the grand jury?

A. Not one word that I recollect.

Q. Was William Rudford the man who keeps the Eagle tavern?

A. The ſame.

Q. Did he mention to you that his politics were different from yours?

A. I do not remember whether he expreſſed it in words, but I underſtood that he meant to convey that idea.

Q. Did you underſtand his politics to be different from your's at that time?

A. I was not certain what his politics were.

Q. When did you ſhew the judge a pannel of the grand jury?

A. It was after the court met on the firſt day of the term; I handed the pannel to the judge to appoint a foreman.

Queſtion by Mr. Campbell.

Did you ever meet Mr. Heath at the lodgings of judge Chaſe?

A. I have no recollection of ſeeing Mr. Heath during the ſeſſion of the court, but upon hearing Mr. Marſhall's teſtimony, I ſuppoſe I muſt have ſeen Mr. Heath in Richmond during the term, as I know him very well; but I have not the ſlighteſt recollection of ſeeing him at the lodgings of judge Chaſe at any time.

Q. Did you ever receive any inſtructions from the judge, relative to the ſummoning of the grand jury?

A. Never.

John Marſhall ſworn—examined by Mr. Harper.

Q. Did you not, at the trial of Callender, make an application to the court in behalf of Colonel John Harvie, who was ſummoned on the jury and wiſhed to be excuſed?

A. At the trial of Callender I was a member of the bar. Colonel Harvie, with whom I was very intimate, informed me, that he had been ſummoned as a juror to try Callender, and expreſſed great unwillingneſs to ſerve; he informed, that he was an improper perſon to ſerve, becauſe he had made up his mind

that the ſedition law was unconſtitutional, and ſhould therefore find the traverſer not guilty, let the evidence be what it might. He requeſted me to interfere with the marſhal, and obtain his diſcharge. I ſpoke to the marſhal and informed him of Col. Harvie's having made up his mind, and that of courſe he was an improper perſon to ſerve on the jury. The marſhal replied, that Col. Harvie muſt apply to the court, becauſe he had determined to conduct himſelf in ſuch a manner as to prevent ſuſpicion of prejudice againſt Callender. I applied to the court for Col. Harvie's diſcharge, on the ground of his being high ſheriff of Henrico county, whoſe court was then ſitting; upon this ground he was diſcharged.

Q. Did you ſtate any other reaſon to the court, why he ought to be diſcharged?

A. I ſtated none other.

John Marſhall croſs-examined by Mr. Randolph.

Q. Was you preſent at the trial of Callender?

A. I was.

Q. Did you ſee any thing unuſual in the mode of conducting that trial?

A. There were ſeveral circumſtances which do not always occur in trials, both on the part of the bench and bar.

Q. Were the interruptions of counſel more frequent than uſual?

A. The counſel for Callender wiſhed to bring before the jury the queſtion of the conſtitutionality of the law. This the court determined to be improper, and whenever the counſel attempted to argue it before the jury, they were ſtopped. After being ſtopped on that point, an argument was commenced on the part of Mr. Hay, to prove to the judge, that he was not correct in the opinion which he had given. Immediately on his commencement the judge ſtopped him, and told him that what he ſaid was not law. Some converſation enſued between them, and Mr. Hay left the bar.

Q. Did thoſe interruptions take place only when the counſel attempted to argue the conſtitutionality of the law, or did they alſo take place on the other queſtions?

A. I have a general impreſſion on the ſubject, which is, that throughout the courſe of the trial, when any thing was ſtated which the judge did not think correct, he immediately ſtated his opinion; but this is alſo his practice in civil caſes.

Q. Do you recollect the cauſe of the miſunderſtanding between the judge and the counſel?

A. It began early and progreſſed with the caſe, but I do not recollect the cauſe of it.

Q. Is it uſual for judges to hear counſel on a point which they have decided?

A. It is uſual for a judge, if he believes a caſe clear, to ſhorten the argument; but if the counſel expreſs a deſire to be heard, it is a piece of decorum to hear them.

Q. Is it the practice in the circuit courts for the judges to adjourn the court for a length of time, and hold a court at a different place, then come back and re-open the court?

A. I only know the practice in thoſe courts where I have been, and I have never known it to be the caſe.

Q. Has it ever been the practice to compel the counſel to reduce queſtions to writing, and ſubmit them to the court?

A. It depends on the circumſtances of the caſe. If doubts are ſuggeſted as to the propriety of the queſtion, the judges will do right to have it reduced to writing—But unleſs there is ſome particular reaſon for it, I have never known counſel compelled to reduce their queſtions to writing. I have never known queſtions reduced to writing in the firſt inſtance.

Q. Did you ever, in a criminal proſecution, know the teſtimony of a witneſs to be rejected, becauſe he was unable to prove all the defence?

A I never have.

Queſtions by Mr. Harper.

Did not judge Chaſe make an offer to poſtpone the trial?

A. I recollect that ſome queſtion was made before the trial. The counſel for-

Callender were of opinion that they ought to have had until the ſucceeding term, as they had filed an affidavit ſtating the abſence of a number of witneſſes. At that time a poſtponement took place for a few days, which appeared ſufficient to obtain the attendance of the witneſſes that lived in Virginia. There was an obſervation on the part of the judge that the counſel ſhould have time to prepare for trial. I think he ſaid they might have a month.

Q. You have been aſked whether it is the practice for courts to adjourn—have not the courts the power to do it?

A. I have never turned my attention to the act of Congreſs on the ſubject.

Queſtion by the Preſident.

Do you recollect any inſtance where the conduct of judge Chaſe was tyrannical and oppreſſive, during the trial of Callender?

A. I have ſtated the conduct of the judge, and the court will be able to judge whether it was tyrannical or oppreſſive.—When Mr. Hay was about to retire, the judge deſired him to go on and aſſured him that he would not be again interrupted.

Queſtion by Mr. Worthington.

Is it uſual in Virginia to try caſes ſimilar to that of Callender at the ſame term the preſentment is made?

A. My practice was never extenſive in criminal caſes; I believe, however, it is not uſual.

Queſtion by Mr. Randolph.

Did you hear the judge apply the epithet of "young gentleman"! to either of the counſel?

A. I think I heard him apply it to Mr. Wirt.

Q. How old do you ſuppoſe Mr. Wirt was at that time?

A. I ſuppoſe he was about thirty.

Q. Was he a married man or a widower?

A. He was a widower.

—

Edmund I. Lee ſworn—examined by Mr. Harper.

Q. Was you preſent at the trial of Callender?

A. I was not in court when Callender was brought there. I was preſent when an application was made for a continuance and overruled.

Q. Do you recollect an offer made by judge Chaſe to poſtpone the trial?

A. Judge Chaſe informed the counſel that he could not continue the cauſe, but that if they would fix any time, when they ſuppoſed they would be ready, he would poſtpone the trial until that time. He obſerved that he would poſtpone it for a fortnight, for a month, and I am not certain but he added that he would poſtpone it for ſix weeks.

—

Edmund I. Lee—croſs examined by Mr. Randolph.

Q. At what ſtage of the trial was this offer made?

A. It was on the application for a continuance I believe.

Q. Did the trial proceed immediately afterwards.

A. It did.

Q. Were Meſſrs. Hay and Nicholas preſent at that time?

A. I believe they were, but I do not recollect any particular reply that they made?

—

John A. Chevalier ſworn—examined by Mr. Harper.

Q. Was you preſent at the trial of Callender?

A. I was in court during a part of the trial.

Q. Did you hear a motion made by the counſel for a continuance of the cauſe?

A. I did not.

Q. Did you hear an offer on the part of the court to poſtpone the cauſe.

A. I do not recollect.

—

John A. Chevalier—croſs examined by Mr. Randolph.

Q. How long have you been in America?

A. About twenty years.

Q. Have you been much in the habit of attending courts of juſtice?

A. I have not.

Q. Did you obſerve any thing unuſual at the trial of Callender?

A. I did not.

Robert Gamble ſworn—examined by Mr. Harper.

Q. Was you preſent at the trial of Callender?

A. I was preſent when the motion was made for a continuance. The judge obſerved that the cauſe could not be continued, but that he would poſtpone it for a month or even ſix weeks, or as long as the term would admit.

Q. Did you hear the converſation between the court and Mr. Baſſet, relative to Baſſet's ſerving on the jury, and what was it?

A. Mr. Baſſet ſaid that he had ſeen extracts in a newſpaper which were ſaid to be taken from the "Proſpect Before Us," and that he had formed an opinion that whoever was the author, he came under the ſedition law. Judge Chaſe aſked whether he had made up his mind on the charges in the indictment, to which Mr. Baſſet replied that he had not, and he was directed to be ſworn on the jury. I did not know what the charges were myſelf, but I did ſuppoſe that they were for a violation of the ſedition law, and that was the general opinion.

Q. Did Mr. Baſſet mention to the court that he wiſhed to be excuſed from ſerving on the jury?

A. He merely ſuggeſted the impreſſions made on his mind as a ſcruple of delicacy.

Robert Gamble—croſs examined by Mr. Randolph.

Q. At the time when you informed the court that you had not "formed and delivered an opinion upon the charges in the indictment," had you ever heard it read?

A. I had never ſeen the indictment, nor heard it read.

Q. Had you made up your mind as to the book called the Proſpect Before Us?

A. I had never ſeen the Proſpect.

Q. You were preſent when the court offered to poſtpone the trial; upon what day was this offer made?

A. I do not recollect.

Q. Was not an objection made to your ſerving on the jury?

A. On the day of the trial Mr. Nicholas obſerved that he would make an objection to me, and I was aſked by the court "whether I had formed and delivered an opinion on the charges in the indictment"—to which I replied, that I had never ſeen the indictment or heard it read, and the court directed me to be ſworn.

Philip Gooch, ſworn——examined by Mr. Harper.

Q. Was you preſent at the trial of Callender in Richmond?

A. I was preſent a part of the time.—I did not hear what was going forward until the jury were called.

Q. Did you go there for the purpoſe of hearing the trial?

A. I had never ſeen a circuit in ſeſſion, and I was anxious to hear the trial of Callender, and for thoſe purpoſes I went to court.

Q. What did you obſerve on the trial?

A. When Mr. Baſſet ſuggeſted to the court ſome queſtion whether he was a fit perſon to ſerve on the jury, the court decided, that he muſt not only have formed, but delivered his opinion alſo, and judge Chaſe proceeded to give ſome reaſons for it, but at the ſame time he conſulted with the aſſociate judge. I ſat near them and could hear their conſultation. Baſſet was then ſworn on the jury. Mr. Nelſon the proſecutor, then opened the caſe, and informed the jury that he ſhould be able to prove the publication; he then went on and examined the teſtimony. After this the counſel for the traverſer called colonel John Taylor as a witneſs. After he was ſworn an objection was made to his teſtimony, and judge Chaſe declared it inadmiſſible. When he made this determination he conſulted with judge Griffin, who declared himſelf to be of the ſame opinion. Judge Chaſe then obſerved that the counſel were men of talents and knew the evidence to be inadmiſſible, and they wiſhed to alarm the people. He then turned to Mr. Nelſon and ſaid, "I wiſh you would ſuffer the evidence to go to the jury. Mr. Nelſon replied that he could not. Judge Chaſe aſked him a ſecond time, and he ſaid he wiſhed he could, but that

it was contrary to law. Mr. Wirt opened the cafe on the part of the traverfer, and faid fomething about the court's prohibiting them. Judge Chafe interrupted him and told him that he muft not reflect on the court, and he made an apology. Mr. Wirt endeavored to fhew the jury that the fedition law was unconftitutional, but the court told him that he had no right to argue that queftion before the jury. Mr. Wirt went on and the judge ftopped him. Mr. Wirt faid "I am going on." Judge Chafe faid, "No fir, I am going on," and told him to fit down. The judge then delivered a long opinion, and faid that the jury were to judge of the law as well as the fact, but not of the conftitutionality of the law. Mr. Wirt faid that if the jury had a right to judge of the law, and the conftitution was the fupreme law, it followed that the jury had a right to decide on the conftitutionality of the law.—Judge Chafe replied that it was a non fequitur, and made a bow, and Mr. Wirt fat down. This produced a conficerable degree of merriment. Mr. Nicholas then rofe and fpoke, and I believe he was not interrupted by the judge. Mr. Hay then followed and was interrupted two or three times by the judge. Mr. Hay then folded up his papers to retire, when judge Chafe faid, "fince you are fo captious, go on and fay what you pleafe;" but Mr. Hay declined going on and retired from the Bar.

Q. Did Mr. Wirt appear hurt when he fat down?

A. I thought he did.

Q. Was the manner of judge Chafe to the counfel rude?

A. When he told them that they knew the law to be contrary to what they faid, I thought the expreffion rude, becaufe it implied a breach of duty.

Q. Did not judge Griffin concur in all the opinions delivered by judge Chafe?

A. I thought he did.

Q. What were the words which judge Chafe made ufe of when he told Mr. Wirt to fit down?

A. They were "pleafe to fit down, Sir."

David Robertfon fworn—examined by Mr. Harper.

Q. Was you in court at the trial of Callender?

A. I came into court when Mr. Hay made his laft motion for a continuance. I took down, for my own amufement, the proceedings in fhort hand. I have compared the fhort hand notes with the printed ftatement, which was publifhed at the requeft of fome of my friends, and to which I will refer.

[*Here Mr. Robertfon read his ftatement as follows*:]

The fubftance of Mr. Hay's conclufion was—

That a poftponement of the trial till the witneffes were prefent, and counfel prepared to defend the traverfer, was eflential to juftice—that this delay was of great importance to the traverfer, as not only his little property, but his liberty, was at ftake; that as to the United States, an immediate trial could be of no conſequence—that the government of the U. States muft forever *reft* on the affections and opinions of a virtuous and enlightened people:—That, ftanding on this bafis, thofe who adminiftered it, could never be affected by the abufe and declamation of an inſignificant and friendlefs foreigner.

Mr. Nicholas then made a few obfervations—We conceive that the teftimony of Mr. Giles is extremely important; he will prove, as Mr. Callender has ſtated in his affidavit, that Mr. Adams, the Prefident, wifhed that the executive had power to control the public will.

This teftimony, when compared with the books of the prefident, will fubftantiate the charges in the book written by Mr. Callender. It will go ftrongly to a confirmation of the charges in difpute; it goes directly to that part of the indictment, where he is charged with having faid, that the prefident is *a profeffed ariftocrat*. It has been ftated, that as there are nineteen charges in the indictment againft the traverfer, though we prove eighteen of them to be true, yet he muft be found guilty, becaufe we do not prove the truth of the nineteenth—but how is it poffible for us to defend ourfelves, or how can we be prepared for trial, if the witnefs, by whom we can prove that

particular charge, be abſent?—If the court think, that, in order to juſtify ourſelves, we muſt prove the whole libel to be true, and it ſhall appear, that teſtimony to prove a particular charge is wanting, the court will afford us an opportunity of adducing it. I conceive, with ſubmiſſion, that the former judgment of the court, in particularly poſtponing the trial, admitted the evidence of Mr. Giles to be material, and that his perſonal attendance would be eſſential to juſtice.

Here judge Chaſe informed Mr. Nicholas, that he had not apprehended the opinion of the court rightly, and that although on the application of the counſel for the traverſer, the court had given them the choice of poſtponement of the trial till to-day inſtead of a few hours; yet it was not meant by that indulgence either to declare the teſtimony of Mr. Giles material, or to poſtpone the trial till another term, on account of his abſence.

Mr. Nicholas then urged once more the neceſſity of poſtponing the trial till Mr. Giles could attend: the queſtion, ſaid he, on a motion for a continuance is, can the teſtimony of the abſent witneſs ſubſtantiate the defence, or the point in iſſue? How can it be done, if the witneſs be not preſent? When a witneſs, to prove the truth of a particular charge, is abſent, I truſt the court will give us time to avail ourſelves of his evidence, and will not precipitate a trial, when a trial will not demonſtrate that the deciſion is right: for if the defendant be found guilty when his witneſſes are abſent, and counſel unprepared, the verdict will not ſatisfy the public mind of his guilt.

Here judge Chaſe ſtopped Mr. Nicholas, and addreſſed the counſel for Mr. Callender thus:—

"It is wholly improper to go back to the former motion—Gentlemen, you miſapprehend the intention of the court, in poſtponing the cauſe till to-day—you ought to confine yourſelves to the preſent motion. Two reaſons are aſſigned for poſtponing the trial: the firſt, that Mr. Giles is abſent, and it is inferred that the court, by not ruling a trial before, admitted his evidence to be material—the court did not enter into the queſtion whether it be material or not. It appeared that he was within a little diſtance of this place, and the cauſe was ſuſpended till Monday, that Mr. Giles might be ſummoned before that day to attend. On Monday you aſked for a poſtponement of the trial for a few hours, and it was ſtated that perhaps he might come in the courſe of the day. Inſtead of a few hours, you had choice of continuing it till to-day. Mr. Giles has been ſummoned, and does not attend—regularly you ought to take out an attachment againſt him for not attending, after having been ſerved with the ſubpœna, and appriſed, that his evidence was required by the traverſer: there is no reaſon to believe he will be here during the term of the court—you do not expect him. If ſuch excuſes as theſe authoriſe a poſtponement of the trial, it muſt be evident that this cauſe will never be tried. It is not neceſſary to ſay whether Mr. Giles, if *preſent*, could be ſworn or not, becauſe the traverſer is not entitled, on general principles, to a continuance. Another reaſon aſſigned is, that as the jury are to aſſeſs the fine, it is eſſential that the traverſer ſhould have the privilege of adducing teſtimony to mitigate it. This may be the practice in your *own ſtate courts*—your *own court* will be governed by your *own laws*; but it does not apply to the *federal courts*—the jury are *not* to regulate the fine. It is a miſtaken idea: they have nothing to do with it. But it is ſtated that the counſel are unprepared to defend the traverſer: you ſhew yourſelves to be men of ability, and there is no difficulty in the cauſe; but you ſay that you are not ready to diſcuſs the difference between fact and opinion: that the charges in the indictment are merely opinion, and not facts falſely aſſerted. Muſt there be a departure from common ſenſe, to find out a conſtruction favorable to the traverſer?—This conſtruction admits the *publication*, but denies its *criminality*. If the traverſer certainly publiſhed that defamatory paper, read it and conſider it. Can any man of you ſay, that the *preſident* is a deteſtable and criminal man? The traverſer charges him with being a murdererer and a thief, a deſpot and a tyrant!—will you call a man a murderer and a thief, and excuſe yourſelf by ſaying it is but mere opinion, or that you heard ſo? Any falſehood, however palpable and wicked, may be juſtified by this ſpecies of argument. The queſtion here is, with what intent the traverſer publiſhed

theſe charges? Are they falſe, ſcandalous and malicious, and publiſhed with intent to defame? It is for the jury to ſay what was the intent of ſuch imputations, and this is ſufficiently obvious—the cauſe *muſt* be tried—I am ſworn to do juſtice between the United States and the priſoner at the bar. I do not dictate to you how you are to defend him, but you muſt defend every man according to the law; and without intending any *diſreſpect* to either of you, I muſt confine you to *what I think* the law."

The marſhal was then ordered to call the jury.

Mr. Nicholas.—We mean to challenge the array, and take every advantage which the laws of the country give us. In ſupport of this doctrine, I will read a paſſage from "trials per pais"—(here he read the paſſage.) I believe there is teſtimony in court to prove that one of the jurors returned by the marſhal, has expreſſed ſentiments hoſtile to the traverſer. It is like a caſe ſtated in the books, where a verdict was ſet aſide, becauſe a juryman had previouſly ſaid, that the man accuſed ought to be hanged; and in that caſe, on the ſecond trial, every juryman was called to ſay, whether he had formed any opinion on the ſubject or not?

Judge Chaſe.—My conſtruction of the law is quite the *contrary*. I have always ſeen *triors* ſworn to decide theſe queſtions—How is this done in your country?—Challenges for favor *muſt* be decided by triors—I ſuppoſe there muſt be triors ſworn.

Mr. Nicholas.—I believe the *books* lay down this diſtinction.—Challenges to the array are either principal challenges, or challenges for favor—cauſes for principal challenges are always tried by the court; challenges for favor are always tried by triors.

Judge Chaſe.—Well Sir, your challenge for *favor*, becauſe you ſtate the juror to *unfavorable* to the traverſer.

Mr. Nicholas.—This book ſtates it as cauſe of *principal* challenge.

Judge Chaſe.—Shew me that book, it is not the beſt authority—have you Coke on Littleton in the houſe. If I had it I would ſee the whole of the doctrine at once. I am perſuaded, that Coke upon Littleton ſtates, that challenges for favor muſt be decided by triors. The oath of the triors is laid down there. Challenges to the array are for partiality in the ſheriff.

Coke upon Littleton being produced and the judge having examined it, obſerved the caſe is clear. Principal challenges to the array, or the whole jury at once, is always for partiality in the ſheriff, and not in the jurors.

Mr. Nicholas admitted it, but ſuggeſted that the law might perhaps conſider the return of a *partial* juror, as ſufficient to ground a challenge to the array, on the principle of partiality in the ſheriff, and wiſhed to know if he was correct in this idea of the law.

Judge Chaſe anſwered, "No Sir, the law is not ſo. You muſt proceed regularly—You may bring in proof if you can, that any juror has delivered his opinion upon that caſe heretofore, or you may examine the juror himſelf upon oath to this effect. You may do either, but not both—and this alternative offered, you muſt conſider not as a ſtrict right."—The counſel choſe to rely on the jurors themſelves. The firſt juror was ſworn, and the judge put the following queſtion to him: "Have you ever formed and delivered an opinion upon the charges contained in the indictment?" The juror anſwered that he had never ſeen the indictment, nor heard it read. The judge then ſaid, he muſt be ſworn in chief. Mr. Hay ſolicited permiſſion to put a queſtion to the juror before he was ſworn in chief. The judge deſired to know what ſort of a queſtion he meant to put, and told him *he* muſt firſt hear the queſtion, and if he thought it a proper one, it might be put.—Mr. Hay. The queſtion which, with the permiſſion of the court, I meant to have aſked, is this, "Have you ever formed and delivered an opinion on the book entitled, The Proſpect before Us, from which the charges in the indictment are extracted?"

Judge Chaſe. That queſtion is improper and you ſhall not aſk it—The only proper queſtion is, "Have you ever formed and delivered an opinion upon this charge." He muſt have *delivered* as well as formed the opinion. Such a queſtion

as you propoſe, would prevent the man from ever being tried—the whole country have heard the caſe, and very probably formed an opinion. You might miſlead men by your ingenuity, and if you were indulged in putting the queſtion, the traverſer might never be tried. He has anſwered that he never ſaw the indictment, nor heard it read, and if he has neither read or heard the charges, I am ſure he cannot have formed or delivered an opinion on the ſubject.

Mr. Hay then expreſſed a wiſh that the indictment might be read to him, becauſe perhaps when he heard and underſtood the charges, he would anſwer, that he had both formed and delivered an opinion upon them.

The judge replied, that the court had already indulged him as far as they could. That the anſwer of the juryman was explicit—that they could not go farther than they had gone—and that he ought to be ſatisfied. The juryman was then ſworn in chief, and the iſſue was explained, that it muſt be proved that the traverſer wrote or publiſhed the book; that the charges were falſe, ſcandalous and malicious, and that he wrote them with intent to defame, and that if he could prove the charges he muſt be acquitted. The ſame queſtion, "whether they had formed and delivered an opinion on the charges againſt the traverſer;" was put by the judge to eight of the other jurymen ſucceſſively, before they were ſworn in chief; and they all anſwered in the negative. The counſel for the traverſer ſaid, that it was unneceſſary to put this queſtion to the other three jurymen, and they were accordingly ſworn in chief immediately. Perhaps it is not improper here to obſerve, that the eighth juror anſwered when the previous queſtion was put to him, that though he had never read or heard the charges in the indictment, and knew not what the traverſer had publiſhed, yet he had formed an unequivocal opinion, that ſuch a book as "The Proſpect before Us," was, came within the ſedition law: But no objection was made to him, and he was ſworn like the reſt. [*See page* 48 *of the* EXHIBITS.]

The proſecutor then proceeded to prove the charges in the indictment, ſtated to be, a ſcandalous and malicious libel. I ſhall not attempt, gentlemen of the jury, to excite your paſſions or inflame your feelings. I ſhall endeavor to be cautious, and avoid uttering what ought not to be ſaid, which may in any manner influence your judgment, upon your oaths; for in that office which I hold, which is that of the people of United America, it is more than a common duty, to take care not to ſtep beyond that line which leads to juſtice. To that ſtate in which your paſſions ſhall be; to ſuch feelings as you ſhall poſſeſs, after hearing the charge contained in the indictment, the evidence in ſupport of it, and a fair ſtatement and repreſentation of the caſe, I ſhall leave and entruſt the caſe. In the preſent ſtate of the buſineſs, it will be proper for me to call your attention to the ſtatute or act of Congreſs, which relates to this caſe.

Here he read the ſecond and third ſections of the law commonly called the ſedition law. The ſecond ſection is in theſe words:—"That if any perſon ſhall write, print, utter or publiſh, or ſhall cauſe or procure to be written, printed, uttered or publiſhed; or ſhall knowingly and wilfully aſſiſt or aid in writing, printing, uttering or publiſhing any falſe, ſcandalous and malicious writing or writings, againſt the government of the United States, or either houſe of congreſs of the United States, or the preſident of the United States, with intent to defame the ſaid government, or either houſe of the ſaid congreſs, or the ſaid preſident, or to bring them or either of them into contempt or diſrepute, or to excite againſt them, or either or any of them, the hatred of the good people of the United States, or to ſtir up ſedition within the United States, or to excite any unlawful combinations therein, or oppoſing or reſiſting any law of the United States, or any act of the preſident of the United States, done in purſuance of any ſuch laws or of the powers in him veſted by the conſtitution of the United States; or to reſiſt, oppoſe or defeat any ſuch law or act; or to aid, encourage or abet any hoſtile deſigns of any foreign nation againſt the United States, their people or government; then ſuch perſon, being thereof convicted before any court of the United States, having juriſdiction thereof, ſhall be puniſhed by a fine not exceeding two

thouſand dollars, and by impriſonment not exceeding two years."—Upon this ſtatute James Thompſon Callender is now indicted, and the indictment charges, that maliciouſly deſigning and intending to defame the preſident, he, James Thompſon Callender, did publiſh the libel ſet forth therein, with intent to bring him into contempt and diſrepute, and to excite the hatred of the good people of the United States towards him. It will be for you, gentlemen of the jury, in this caſe to determine whether the traverſer has or has not been the publiſher of this paper.—This point being aſcertained, it will be for you to conſider with what view and for what purpoſe, a paper like this has been compoſed and publiſhed.

If you believe it to be a candid and fair diſcuſſion of conſtitutional ſubjects, of real grievances or of political opinions and principles generally, you will not conſider it to be a libel within the ſtatute. If you believe the facts and allegations averred in the paper are true, you will conſider that the traverſer hath defended himſelf according to the ſtatute, but if, from internal evidence in the paper itſelf, you do not think ſo, you do not believe it to be a candid evidence and fair diſcuſſion of conſtitutional ſubjects, real grievances or political opinions and principles, and that it does not contain the truth in all parts, you muſt find the traverſer guilty.

Mr. Nelſon was about to introduce evidence on the part of the United States, when Mr. Hay obſerved, that he underſtood, that ſome of the witneſſes who were to be examined to prove the guilt of the accuſed, were themſelves in the eſtimation of the law, equally guilty; that they had printed, though they had not written the libel in queſtion; he would therefore beg leave to make it known to thoſe who were in any degree implicated, that they were not bound to accuſe themſelves, and might withhold if they thought proper, ſuch part of their evidence as had a tendency to criminate themſelves. The judge replied, that he was correct in his ſtatement—that every perſon concerned in the publication was protected by law, from compulſion to criminate himſelf, but he added, I ſuppoſe if any of them give his evidence, the government of the United States is pledged not to inſtitute a proſecution againſt him—of this he may be aſſured.

The ſubſtance of the evidence was nearly as follows:

The firſt witness called upon, was Mr. Wm. Duval—he ſaid that he ſaw Mr. Henry Banks have the book called "The Proſpect Before Us"—that Mr. Banks gave him the book to read—that the next day he ſaw Mr. Callender, who told him that he muſt pay him a dollar for the book given him by Mr. Banks—that he did then pay the dollar for it to Mr. Callender, and that the book, he believes, contained ſome of rhe charges in the indictment.

Mr. Banks was then called—he declared, that ſome time ago, he had become a ſubſcriber to the book entitled, "The Proſpect Before Us." and paid the money at the time of ſubſcription—that he lent the book to major Duval and ſent to inform Mr. Callender that he might get the money for it of major Duval, and that he could get another copy for himſelf, another time—that he got from Mr. Callender the copy he delivered to major Duval—that he never heard the traverſer acknowledge that he was the author, but that his opinion upon the ſubject was clear. The judge told him that his opinion was no evidence againſt the traverſer.

William Burton was next called—He ſaid that he purchaſed ſuch a book from Mr. Pleaſants (who is a bookſeller as well as a printer)—that he paid the money to Mr. Pleaſants and Mr. Callender was preſent.

William A. Rind was next called---His teſtimony ſubſtantially was, that a copy of the book in queſtion, then in court, belonged to him---That a conſiderable time ago, Mr. Lyon applied to them to print the National Magazine---that they entered into contract for the purpoſe of printing 22 ſheets of that, or an equivalent in other work---that after a great part of the Magazine had been printed, it ſtopped, either for the want of paper or ſome other cauſe---That Mr. L. then brought "The Proſpect before Us"---that they printed 4 or 5 half ſheets of it---that the proof ſheets were ſent to Mr. Callender for correction, and returned corrected in his hand writing---that Mr. Callender once

corrected a proof ſheet in a large room at the office---that Mr. Callender came once to hurry the work, and ſaid he would pay : but that he conſidered Mr. L. as pay-maſter---that at Mr. Dixon's office, Mr. Callender ſaid he would give him 20 copies if he read one through, as he was ſure it would convert him---that a ſmall part of the manuſcript remained in his poſſeſſion, which he produced, then in court, and which he believed to be the hand writing of Mr. Callender.---Being aſked if he had ever ſeen Mr. Callender write, he ſaid he had---that Mr. Callender once took the debates in the houſe of aſſembly for them. The book and manuſcript ſheets were then compared and found to correſpond---this occupied ſome time, and the judge took ſome pains in examining and comparing them.

Mr. Meriwether Jones was next called upon-- The ſubſtance of whoſe evidence was, that he had never read the book till after the preſentment was made, except a few paſſages, and perhaps about 33 pages, that not a word of it was printed at his office, though he ſold ſome copies for the benefit of Mr. Callender, that he only poſſeſſed one copy (which he then ſhewed) and which he declared he found where Mr. Callender generally kept his papers---that whenever he ſold any of the books, Mr. Callender received the money---that he kept a memorandum of the money he received, that he might know how much he owed him---that he could not poſitively ſay whether Mr. Callender was the author of the book or not---that he had never told him he was---though he had his opinion and belief on the ſubject---that he had publiſhed propoſals to print the book, and afterwards, that he had them for ſale---but he did not recollect whether he publiſhed that he had them for ſale for the benefit of Mr. Callender, though the fact was ſo;---that the ſtrongeſt proof he had of Mr. Callender being the author, was a converſation he had with him, reſpecting that part of the book, where ſpeaking of Waſhington and Adams it uſes the term *paltroons*---Mr. Callender ſaid he alluded to ſome who had received appointments from them, and not to themſelves.

The next witneſs called was Thomas Nicholſon, who is alſo a printer;---His evidence was, that Mr. Callender had called at his houſe, to engage him to publiſh a part of the book---that he could not do it then---that he called on him the next day, accompanied by Mr. Meriwether Jones, for whom he was then engaged to print---that Mr. Jones told him, that he might ſuſpend his work, which he was then engaged in, to do Mr. Callender's---that he printed ſeven pages of the book, that Mr. Callender paid him for it ; and he underſtood it was for his emolument.

Then Mr. John Dixon, alſo a printer, was called. He ſaid that he printed the greateſt part of the book, (about 120 pages) at the requeſt of Mr. Lyon, and that Mr. Callender corrected the proof-ſheets.

Mr. James Lyon's evidence was in ſubſtance, that he did not know that Mr. Callender was the author of the book, but that he knew him to be the publiſher of it, jointly with himſelf---and that he probably (but he did not recollect certainly) had furniſhed Mr. Rind with the copy of the book---that Mr. Callender corrected the ſheets from the preſs---that he never ſaw Mr. Callender writing, but ſuppoſed from having ſeen the manuſcript, and ſome writing which was (ſaid to be) written by him, that he wrote it.

And then Mr. Samuel Pleaſants, another printer, was called—He depoſed, that he had ſold copies of this book---he underſtood that the books were ſent to him from the book-binder, for Mr. Callender ---that he received both the money and the ſubſcription papers for him, and paid him the money he received—that he ſold perhaps an hundred copies.

The oral teſtimony of the United States being finiſhed, the attorney for the United States was about to point to the jury, the paſſages in " The Proſpect Before Us,"---correſponding with the charges in the indictment, when Mr. Hay objected to the introduction of that book.

I conceive, ſaid Mr. Hay, that this book cannot be adduced in evidence, in ſupport of the charges, ſtated in the indictment. Perhaps my ſtating to the

court, the reaſons which have led me to this concluſion, may ſubject me to the imputation which has more than once fallen from the bench. It has been the pleaſure of the court to obſerve, that the defence had been conceived and continued in error. What I am about to ſay will not perhaps induce the court to change that opinion. It is with great diffidence I addreſs the court on a ſubject which I have not had ſufficient leiſure to inveſtigate. If unfortunately my conception of this law be miſtaken, I hope I ſhall be excuſed, and that the reprimand will not be ſevere, when it is recollected, that I have had not ſufficient time for a full examination of the caſe. The poſition for which I contend is, that the book entituled, "The Proſpect Before Us," cannot be given in evidence in ſupport of the indictment. The title of the book is not mentioned in the indictment. It ſtates, that "on the firſt day of February, one thouſand eight hundred, the traverſer did write, print, utter and publiſh a falſe, ſcandalous and malicious writing againſt the preſident of the United States, of the tenor and effect following: "The reign of Mr. Adams, &c."—In proſecutions for libels in the Engliſh courts, great ſtrictneſs is obſerved; the difference of a ſingle letter between the words of the indictment and thoſe in the written or printed paper adduced in evidence, is fatal; and when "*tenor and effect*" are inſerted, all the authorities concur in declaring, that they impoſe on the proſecutor the neceſſity of proving the very words in the indictment. The firſt charge in the indictment is for a libellous writing of the following tenor: "The reign of Mr. Adams has been one continued reign of malignant paſſions." The book which is introduced in ſupport of this charge, begins differently, and contains an hundred other pages, and many pages beſides, and is not named in the indictment. The poſition for which I therefore mean to contend is, that when libellous paſſages are extracted from a book, which has a name by which it can be deſcribed, it is the duty of the proſecutor to deſcribe the book by that name; for inſtance, he ought in this caſe to have ſtated, that the party accuſed had publiſhed a falſe, ſcandalous and malicious writing, entitled "The Proſpect Before Us," containing among other things, the paſſages complained of. There are two ſtrong reaſons to ſupport this doctrine. The firſt ground on which I reſt the validity of this obſervation, is, that the practice has been invariably ſo, I have taken the trouble of examining 15 or 20 caſes, in all of which, the books from which libellous paſſages were taken, had a name or title, and the proſecutor deſcribed every of them, by the name which the author had choſen to give it. From theſe I will ſelect three caſes, to ſhew that the deſcription of the libellous writing, by the title given it by the author, has been deemed eſſentially neceſſary, the firſt of which was remarkable for the length of the title; the ſecond, where the paper contained the libel, had a number as well as a title, and both the number and the title were recited. [Here Mr. Hay ſhewed from a book concerning libels, that the title in thoſe two caſes, and the number in the latter of them were recited] and the third, where the libel was publiſhed in the French language, in which caſe the title, though lengthy, was recited in that language, and then in Engliſh. In page 87 of the ſame book, there is a hiſtory given of a proſecution by information againſt the Chevalier Deon, for publiſhing a libel againſt the count de Guerchy, ambaſſador from France. The proſecution was commenced in the court of King's Bench. The information ſtates the title, the name of the libel fully and literally, as it was publiſhed in French, and then ſtates the tranſlation in Engliſh at full length. I bring forward theſe caſes to prove, what the practice is---and it is an obſervation of one of the beſt judges that ever ſat in the King's Bench, *Lord Holt*, that the form of pleading is evidence of what the law is.

If then it be the practice to recite in the indictment the name, to deſcribe the title of the book, or libel publiſhed; if this has been the invariable practice ever ſince the unhappy proſecution for libels took place in that country—I believe there is no doubt but the title of this book ought to have been ſtated in the indictment. I have learned to think with diffidence, but I am firmly perſuaded, that the attorney for the United States cannot give a ſingle caſe from the Engliſh books of a contrary practice; and with

respect to prosecutions in the United States, I know not what the practice may be in the few instances that may have occurred.—It appears too that substantial reasons, founded on principles of sound law, and sound justice, can be adduced in support of this practice. A principle on which I rely to explain this practice to be correct, is, that it is an universal rule of law, that if a man's words, spoken or written, be made the foundation of a charge against him, the whole should be taken together. If the whole writing charged to be libellous, be stated in the indictment, it will be in the power of the defendant to resort to other passages of the same book to explain it —If the defendant were indicted for publishing "The Prospect Before Us," he could resort to other parts of the book for an explanation. It was the duty of the attorney of the United States to have done so; as he has omitted it, he ought to be precluded from producing it in evidence.—I will now state the other reason, in support of my objection to the admissibility of this book as evidence: It is founded on this principle, which hath always prevailed, or was supposed to prevail, in criminal law, that in all criminal cases, the offence should be described, with all possible accuracy and precision. In felony, it is necessary to insert in the indictment the goods and chattels alledged to be stolen, as well as the name of the person to whom they belong. The reasons are furnished by the books, why this precision is deemed necessary; the first, that the defendant may know the charge against him, and be able to defend himself; the other, that he may plead the conviction or acquittal in bar of a subsequent prosecution for the same offence. [Here he referred to Hawkins's Pleas of the Crown, page 392, as authority.] The defendant is charged with writing and publishing a libel of *the following tenor and effect*; and but very few passages are selected from the books, which bear but a very little proportion to the extent of the whole of it. I ask how is the defendant to know whether these few passages were taken from "The Prospect Before Us," or from some newspaper, in which they have been republished, by some person, for whose conduct he was not responsible? Unless the charge be accurately specified, it is impossible for him to defend himself. In support of this indictment, evidence as to either case might be brought forward.—If in the indictment he had been charged with publishing a book, entitled "The Prospect Before Us," he would have known with an absolute certainty and demonstration (by the copy with which he had been furnished) what was meant to be proved against him, and what was necessary for him to prove in his own vindication; as this is not the case, and as he was not bound to know whether the passages were taken from the book or a newspaper, containing extracts from it, in the publication of which he had no concern, and for which he is under no responsibility, he ought to be sheltered by law from this evidence, which is attempted to be introduced against him. The second reason has made a great impression on my mind, and yet retains its influence. I conceive, that one writing against the president, containing fifty libellous passages, if published at the same time, can be but one act, and if there be but one act, there can be but one prosecution; if the present indictment had mentioned the title of the book, and the very passages relied on, as parts of this book, and the decision of this jury and this court which is about to be pronounced in this case, might be pleaded in bar to any subsequent indictment, for the same or any other passages in the same book. It is no argument to say, that there will be no subsequent prosecution; in times like these, it is impossible to predict what may be attempted, and if such a prosecution were to take place, I should not be more surprized than I am at present. If the title of the book had been inserted in this indictment, and a subsequent indictment were to be brought forward, I know that the defendant would plead in bar, that he had been formerly convicted or formerly acquitted; and the production of the record alone, would protect him: but if the title of the book is not to be recited, the record will not be conclusive, and a second prosecution may take place: for the second indictment, compared with the present record, will contain no internal evidence, that the traverser had been formerly tried for the same offence, but he must resort to oral testimony, to prove that this book

had been given in evidence against him at a former trial; and he might not be able to procure witnesses, whose testimony would be sufficient to establish this point. These are the reasons which induce me to think, that this book ought not to be admitted to go in evidence to support the charges in the indictment. This principle has a considerable operation in questions of a private property. In an action of a debt, if a bond or writing be the ground of the action; if there be the most minute variance between the bond or writing stated in the declaration, and that which is adduced in evidence in support of it, the party must suffer a nonsuit. If this precision and minute attention to accuracy be required in actions of property between man and man, is it not infinitely more important that the same principles should govern in criminal cases? If the argument be good in one case, it appears to be irresistible and omnipotent in the other.

Here judge Chase requested Mr. Hay to point out these parts of the authorities referred to, on which he relied to establish his doctrine.

Mr. Hay.—If the court will have a little patience I will find the places.

Judge Chase.—I will have a great deal.

Mr. Hay.—The authorities I rely on are, Hawkins's plea of the crown, page and Salkeld's reports, page 660. —In this last book it is adjudged, that when an indictment uses the words "*secundum tenorem et effectum*," it binds the prosecutor to a literal recital; and any the least variance between the charge in the indictment and evidence offered to support it, is fatal. The case I here refer to was an information for a libel: "In which libel were contained divers libellous matters *secundum tenorem et effectum*, and in setting forth a sentence of the libel, it was recited with the word "nor," instead of the word "not," but the sense was not altered thereby; the defendant pleaded not guilty, and this appearing upon evidence, a special verdict was found, and the court held, that the word *tenor*, imports a *true copy*, and that the variance was fatal; for, not," and "nor," are different; different grammar, and different in sense; and Powy's Justice held as to the point where literal omissions, &c. would be fatal; that where a letter omitted or changed, makes another word, it is a fatal variance; otherwise, where the word continues the same; and in the principal case, no man would swear this to be a literal copy."

It appears from well established authorities, that the words "in manner and form following," do not bind the prosecutor to recite exactly, but the word "*tenor*," both so strict a technical meaning, that it binds him to a *literal copy*.

These principles certainly apply to the case before the court. The words "tenor and effect following," are stated, and the evidence is variant.

Here judge Chase interrupted Mr. Hay, and spoke to this effect: You are certainly mistaken in your statement of the law, as applied to the case now before the court. In the cases you mention, there is really a variance between the indictment and the evidence. Your objection is, that there is a variance between the thing charged in the indictment and the writing offered in evidence.—But this case is very different; there is no variance: To ascertain this point, I will state the indictment, and compare it with the law on which the prosecution is founded. The indictment charges, that the traverser, "maliciously intending to defame the president of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, did wickedly and maliciously write, print, utter and publish a false, scandalous and malicious writing, against the president of the United States, of the tenor and effect following, that is to say: "The reign of Mr. Adams has hitherto been one continued tempest, &c." Now what is the law? The act of congress provides among other things that, "if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, any false, scandalous and malicious writing or writings, against the government; or either house of the congress, or the president of the United States, with intent to defame the said government, or either house of congress, or the said president, or to bring them, or either or any of them, into contempt or disrepute, or to excite against them, the hatred of the good people of the United States,

&c." The indictment charges the defendant with publishing a false, scandalous and malicious writing against the president, and the law provides against the publication of false, scandalous and malicious writings against the president. —The offences stated in the indictment correspond with those expressed in the law; the question then is, whether the name of the book in which such false, scandalous and malicious writings are published, must be recited in an indictment against an offender? It brings it to this point—Is it necessary that the title of the publication should be examined, before it can be ascertained that it comes within the law. *Any* false, scandalous and malicious writing published with intent to defame, is provided against by law, whatever may be its title or name, or whether it have any name or not. I know that cases can be produced, where the title of the libel is recited in the indictment. I remember one case where a man was indicted for publishing a libel called "*The Nun in her smock*;" but it was not necessary to mention the title of the libel in that case, nor is it essential in any. Why is it necessary that every charge against a defendant should be explicit? It is that he may clearly comprehend it, and be prepared to make his defence: It is not necessary for this purpose to recite the name of the libel. The charge against the traverser is very explicit, and he well understands and is prepared to defend it; but it is no censure on his counsel, that they urge this argument in his favor. You argue further, on a supposition, that if a subsequent prosecution were to be instituted for the same offence, the verdict and judgment now to be rendered, could not be pleaded in bar. It requires very little legal ability to demonstrate, that the title need not be recited: and it is equally easy to prove, that the decision in this case may be pleaded in bar of any other prosecution for the same offence. The attorney for the United States must prove, that the traverser did publish a false, scandalous and malicious writing, with intent to defame the president. This can be done without reciting the title; and if he supports by the evidence any entire charge—if he proves that the traverser did publish *any false, scandalous and malicious writing*, it will be sufficient to support the indictment as to that charge, but he must be acquitted of the other charges: and the charges of which he may be found guilty, can be easily compared to charges in any subsequent indictment. This is quite different from the cases where there is an actual variance between the paper charged, and the paper offered in evidence. I understand that difference to be, that where the prosecutor undertakes to say, that certain *precise words* have been published, he must establish them; but when he states words of the tenor and effect following, he will only be obliged to prove the substance; but you insist that the whole original, including the title, must be copied in the indictment *verbatim et literatim*. I wonder you did not add *et punctutatim* also. There is no real variance, and there is an end of the objection. You are mistaken.—I pronounce this to be the law, and I shall instruct the jury, that they may find the traverser guilty of part of the charges, and acquit him of such as are not proved.

Judge Chase then informed the attorney for the United States, who was about to rise to prove the admissibility of the book as evidence, that it was unnecessary for him to make any reply, and there was no good reason to exclude it; that all that was necessary to be done on the part of the United was to prove the charges to be true, and the book called The Prospect Before Us, was good evidence to support it.

This point being determined, Mr. Nelson then addressed the jury at great length, to the following effect:

GENTLEMEN,

Although the paper is long and complicated, the testimony is not so. The testimony, as I stated to you before, is concise, plain and correct. If there be a man who, now that he has heard that testimony, entertains a doubt whether this libel was published by the traverser, it will be faithless for me to address him; if there be a man who doubts on that point, his mind must be imperviable to the traits of truth; his mind must be panoplied o'er with doubt, scepticism and prejudice. If no doubt remain on this point, the question first in order to be examined, is decided: whether there be room for doubt, a summary review of the

teſtimony will aſcertain. Can there be a doubt, when all the witneſſes have concurred in eſtabliſhing this one point—That James Thompſon Callender corrected the proof ſheets? Can there be a doubt, when thoſe who ſold the copies of the book, have all ſaid that they ſold them for his benefit, and that he received the money? When it has been proved that he received the money from one purchaſer himſelf, and that he paid for printing part of it---that part of the manuſcript is in his own hand writing. Can there be any doubt?---And when in addition to this, one witneſs declares, *that he knew him to be a joint publiſher* with himſelf, & another witneſs declared, that he explained the meaning of a certain term, ſuppoſed to be ambiguous in its application, is it poſſible to entertain any doubt: Thus ſtands the evidence, as to the publication: It will be proper for me, gentlemen of the jury, to ſtate to you what is a publication in point of law, as to writing or printing: That the direct or indirect circulation or emiſſion of a libel, is a publication thereof, in law and in fact, has never been queſtioned in a court of law. If it appears to you, that James Thompſon Callender, did not directly or indirectly emit or circulate this paper, then is he not the publiſher thereof; if he be not the publiſher directly nor indirectly thereof, then ought he to be acquitted: And if he be the publiſher, and the intention thereof be not criminal, that is, if the matter therein contained be not falſe, ſcandalous and malicious, ſtill ought he to be acquitted; but if he be the publiſher, and the matter be libellous, that is, falſe, ſcandalous and malicious, the intention muſt be wicked and criminal, and you muſt find him guilty; for the queſtions you are to try, gentlemen of the jury, are---Was this paper publiſhed by the traverſer? Was the intention criminal? that is---Is the matter falſe, ſcandalous and malicious; the evidence which you have heard aſcertains the firſt queſtion, and an examination of the paper, or ſuch part of it as are laid in the indictment will decide the ſecond queſtion. Whether your hearts are at eaſe---whether your paſſions are untouched---whether your feelings are unaffected, now that you have fully heard the charge, you beſt know. It remains only now for me, gentlemen of the jury, to call upon you, in the name of your country, whoſe intereſt you are to defend, whilſt you protect the rights of the individual. I call upon you in the name of your God, a portion of whoſe juſtice, you are about to adminiſter, and on your oaths, uninfluenced by favor, partiality, prejudice or affection, to diſcharge your duty to your God, to your country and to yourſelves.

Here Mr. Nelson read the first charge in the indictment.

It is for you to say, whether from the internal evidence of the book itself, it be not falſe, ſcandalous and malicious. If he can prove to a demonſtration, that the adminiſtration of the preſident has been one continued ſcene of malignant paſſions, you will acquit him; but if from its own internal evidence, it be falſe, you muſt say whether it be done with a criminal intention. Can this charge be delivered by any man, *who knows* that the government under which we have the happineſs to live, is a government choſen by the people themſelves?—who can believe, that the adminiſtration has been a continued tempeſt of malignant paſſions, when he reflects on our unexampled proſperity and happineſs? If it be the beſt form of government, that ever was diſcovered by mankind, how is it poſſible for the people not to be attached to it? "*As preſident he has never opened his lips or lifted* "*his pen without threatening and ſcolding*:" this in common caſes, might not be ſcandal; but in what an attitude does he place the moſt elevated and enlightened character in our country? Do you believe, that he meant to excite the hatred of the people againſt him? —The libel then goes on, "*The grand* "*object of his adminiſtration has been* "*to exaſperate the rage of contending* "*parties; to calumniate and deſtroy eve-*"*ry man who differs from his opinions.*" What poſſible object could the traverſer have, but to excite the hatred of thoſe immediately around him, as well as of all others, againſt the preſident, by thoſe libellous words? If he could excite their indignation, he might excite the indignation of all others.

"*Mr. Adams has labored, and with* "*melancholy ſucceſs, to break up the* "*bonds of ſocial affection, and under*

"*the ruins of confidence and friendship*
"*to extinguish the only beam of hap-*
"*piness, that glimmers through the*
"*dark and despicable farce of life.*"
Here the president is represented in his private character, as dissolving all the bonds of social affection, as fomenting discord, and exciting differences between brother & brother & father & son. Is this true? what evidence is there of its truth? If not true, with what intention has he published it? Was it not to excite the contempt and hatred of the people against him? His object cannot be misunderstood. Take the whole of this libel together; and you cannot hesitate to say, that it is false, scandalous and malicious.

"*The contriver of this piece had*
"*been suddenly converted, as he said*
"*to the presidential system, that is, a*
"*French war, an American navy, a*
"*large standing army, an additional*
"*load of taxes and all the other symp-*
"*toms and consequences of debt and*
"*despotism.*" In a political point of view every person has a right to discuss, fully and fairly, the conduct of the government, and to state candidly, supposed grievances. If in this part of the paper, the terms were used, for these constitutional and just purposes, they could not be libellous. These terms admit of different constructions—they may or may not be libellous, but there is not a single sentence which is not libellous, as used here. Hear the system of the president is represented to consist of the most odious and detestable measures, "*a French war, an American navy, a load of grievous taxes, and a large standing army.*" It is unnecessary to enquire into the general propriety or impropriety of such measures, because the book is evidently emitted with a malicious intention. If you were to think his words were true, but published with a malicious intention to defame, you could not exculpate him; the conclusion of his climax renders a misconception of his meaning impossible; "*and all other consequences of debt and despotism.*" After such explicitly malignant terms, you cannot hesitate to say, that he is guilty—it is represented to you, that he will tax and oppress you, and exercise despotic, tyrannical powers over you.

Are these terms used with any other intention, than what is stated in the indictment?

The next part of the libel is—"The "*same system of persecution has been*
"*extended all over the continent;* every
"*person holding an office, must either*
"*quit it* or *think and vote exactly with*
"*Mr Adams.*" This you cannot believe unless irrefragable testimony be produced to you. Here is an attempt to draw the confidence of the people from the supreme magistrate—if in the discharge of his public duties, he should call for the co-operation of a man of talents and virtue, the answer would be, every person who holds an office under you, must be kept tied down precluded from the free exercise of his own judgment or must quit his office: would not these words be in the mouth of every individual who believed this libel? Can a more wicked intention exist, than what this publication proceeded from? Here is falsehood, here is scandal, here is malice, you cannot hesitate to say, he is guilty.

"*Adams and Washington, have since*
"*been shaping a series of these paper-*
"*jobbers into judges and ambassadors, as*
"*their whole courage lies in want of shame;*
"*these paltroons, without risking a manly*
"*and intelligible defence of their own*
"*measures, raise an affected yelp against*
"*the French Directory; as if any corrup-*
"*tion could be more venal, more notorious;*
"*more execrated than their own.*"

You will see gentlemen, when you retire, that there is abundance of libellous matter in this part of the paper. Could you admit that the parts separately considered were not libellous, yet when taken together, you must conclude them to be false, scandalous and malicious—a most malignant and groundless charge. The thought of such words as these, must excite indignant astonishment, that the individual who wrote them, was permitted to keep his foot on this land.

"*The object with Mr. Adams was, to*
"*recommend a French war professedly for*
"*the sake of supporting American com-*
"*merce; but in reality; for the sake of*
"*yoking us into an alliance with the*
"*British Tyrant.*" There is not a single charge that is not false. This two-fold charge is doubly malicious. This is certainly a libel, unless he can prove the

truth thereof. Can it he believed that your chief magiſtrate can act in a manner ſo hoſtile to his own country? It is not neceſſary for me to *diſprove*, they muſt *prove* the fact: were it incumbent on me to adduce proof, I ſhould tell you of the exertions of the preſident to make peace with France—I ſhould tell you,—that he attempted negociation after negociation. For what purpoſe did he repeatedly endeavor to effect a reconciliation? Do acts like thoſe mark an intention and deſign to make war with France? Can you believe that he was going to make war, not for the profeſſed purpoſe, but for another? that your preſident ſays one thing and does another? that he would betray the intereſts of his own country, to promote thoſe of another? Your own minds muſt tell you, gentlemen, that this charge is falſe and malicious. The paper then proceeds—"*While "such numbers of the effective agents of the "revolution languiſh in obſcurity, or ſhiver "in want, aſk Mr. Adams, whether it "was proper to heap ſo many myriads of "dollars upon William Smith, who, next "to Hamilton and himſelf, is, perhaps, the "moſt deteſted character on the continent?*"

This ſentence divides itſelf into parts, a poſition is laid down circuitouſly and not directly, or affirmatively; but it amounts to an affirmative declaration, that the preſident had heaped myriads of dollars upon William Smith: When he aſks whether it was proper to heap the money on Mr. Smith, you muſt take it as an affirmation. With what intention is this ſaid? To excite jealouſy, contempt and hatred, againſt the preſident, by endeavoring to inculcate a belief, that the money of the people is ſquandered away, and that they are thereby brought greatly in debt, ſo as to require the impoſition of heavy taxes: this cannot be true, your preſident has not power to diſſipate your money: this charge is falſe on the very face of it; it is malicious and ſcandalous, becauſe made to excite the hatred and indignation of the people towards him. How is your preſident painted to you? As the moſt deteſtable character on the continent. What was the object of the publication of this book, when it repreſents a man of pure, unſullied reputation; of an uniformly moral character, as the moſt deteſted character on the continent? and this repreſentation is intended to make impreſſion on thoſe who have not the means of information. It is not in the power of thoſe who know the fallacy of this charge, to go all over the continent to diſprove it: but it is ſelf-evidently falſe; do you not believe it to be ſo; If it be not true, lay your hands on your hearts, and you muſt find it to be ſcandalous and malicious.

"*You will then take your choice be-*
"*tween innocence and guilt, between free-*
"*dom and ſlavery, between paradiſe and*
"*perdition—you will chuſe between the*
"*man who has deſerted and reverſed all*
"*his principles, and the man who ſe own*
"*example ſtrengthens all his laws; the*
"*man whoſe predictions, like thoſe of Hen-*
"*ry, have been converted into hiſtory.*
"*You will chose between that man, whoſe*
"*life is unſpotted by a crime, and that*
"*man, whoſe hands are reeking with the*
"*blood of the poor, f iendleſs Connecticut*
"*ſailor! I ſee the tear of indignation ſtart-*
"*ing your cheeks! You anticipate the name*
"*of John Adams.*"

I aſk you, what are your feelings at the recital of this atrocious charge? For my part, I lay down the book in diſguſt. How ſwollen and pompous his language; in recommending to the people an individual, whom he thought worthy of their confidence; but when he brings the preſident before the eyes of the community; what a figure is repreſented? What terms of reproach, degredation and infamy does he not apply to him? I ſay that theſe are circumſtances which mark malice. Is the conduct of the preſident ſo wicked as to produce perdition to the people? Is it true, that the preſident has changed his ſentimen s? You are to preſume, that the principles of your preſident are ſuch as become him, and the fame which ſo eminently diſtinguiſhed him in the revolution, and which led to his preſent elevation; but here you aae told, that he has reverſed all thoſe good principles. This is not proved to you—it is falſe, and conſequently malicious. *His hands* are repreſented as *reeking with blood*. Here he makes worſe than a direct charge of murder: the language here uſed is more impreſſive than the terms moſt appropriate to expreſs

that crime. Theſe words are ſubſtituted in lieu of the proper technical terms, becauſe they are better calculated to inflame the public mind, and make a deeper impreſſion than the word *murder*. Yet, this is the reſpectable citizen, who has presided over our councils! Is there any individual on the continent, who believes, the preſident is guilty of murder? Let not paſſion guide the pen when you write the verdict—if the evidence will warrant you to ſay that the ſupreme magiſtrate is a murderer, you will find the traverſer not guilty. I have not called your recollection to what was not neceſſary—the falſe ſtatements, and uncandid repreſentations, relative to the failor alluded to. I have referred to your own hearts for the falſehood of this part of the libel; and being untrue, and publiſhed from no motive which can be juſtified, it is malicious, and within the words of the indictment.

"*Mr. Adams has only completed the* "*ſcene of ignominy, which Mr. Waſhing-*" *ton began.*"

I will not call to your recollection that highly revered name—I thought that there was not an individual on the continent, who would ſpeak of the immaculate purity, and whit*robed* honeſty of this great character, in terms of the leaſt diſreſpect. Yet this man charges Waſhington with having commenced, and our preſident with having completed, ſcenes of ignominy!—Scenes of ignominy, which Waſhington was not only engaged in himſelf, but aſſociated others with him!—This is falſe, defamatory and malicious.

The next part of his book, which I ſhall animadvert on, is in theſe words—"*This laſt preſidential felony, will be* "*buried by Congreſs, in the ſame criminal* "*ſilence, as its predeceſſors.*"

As your preſident has been repreſented to the world as a murderer, he is here held up as felon; as a perſon who has committed theft on the public. I will not make a ſingle remark on this charge. I ſubmit it to you, whether it be true or not; and whether it be not malicious, and within the terms of the indictment.—

Here again is the height of defamation, "*That foreſaw in whatever it deteſtable, Mr. Adams feels anxiety to curb the frontier population. He was a profeſſed ariſtocrat. He had proved faithful and ſerviceable to the British intereſt.*" The words "profeſſed ariſtocrat" were mentioned and obſerved upon by the defendant's counſel; but it is an expreſſion which admits of nothing, being proved "ariſtocrat" is a term extremely vague, and is indefinite as any language can be. If uſed by a collegian in his cloſet, according to the priſtine meaning of the original *greek*, he would ſay, that an ariſtocratical government was the beſt government in the world—he would ſay, that it was the government of the beſt men. "*Ariſto's*" mean, in the original, the *beſt*, his definition of an *ariſtocrat* would naturally be the beſt man; whoſe ideas on the ſubject of government were the moſt correct. This, ſir, would be the underſtanding of him who had no intercourſe with the world. But when you go abroad into the world, you find different conſtructions; ſome who conſider it according to the original meaning, the beſt government, and that to call any man an "ariſtocrat" is no ſlander; others, who think it oppreſſive and tyrannical—the government of the few over the many. When there is ſuch a diverſity of conſtruction, every attempt to explain it would be ineffectual. To aſcertain whether it be libellous or not, you muſt inquire into the intention of the author—if you could believe that it was uſed fairly as a mere term of candid deſcription, you would ſay that he is not guilty of a libel; but when you ſee that it is here uſed with wicked intention, though vague in its meaning, you muſt think it falſe, ſcandalous and malicious, for as it is with a view to excite the contempt and hatred of the people towards the Preſident, it muſt be libellous. If the truth were attempted to be proved that he was really an *ariſtocrat*, you might entertain a different opinion from him, and draw a different concluſion, when you come to read the following words, they ſhew his intention to be, to excite the contempt and hatred of the people: "*That he proved ſerviceable to the British intereſt,*" meaning that he had done every thing he could to injure the intereſt of his own country, to promote that of a foreign nation. His repetition of the charge ſhews malice; ſeveral charges go to his private character, but this goes to his public character only. Gentle-

men may well say, that a difference of opinion exists among all the citizens of the United States; if they were fair arguments, deduction necessarily following just premises, a candid diffusion of principles, they could not be the subject of this indictment; but when it is not even attempted to shew any necessary deduction, any fair and candid conclusion from premises clearly established, can these terms be used with any other intent than to excite the indignation of the people towards the supreme magistrate, and to withdraw their confidence from him? It is therefore false and malicious. "*Thus we see the genuine character of the President — when but in a secondary station he censured the funding system — when at the head of affairs he reverses all his former principles. He exerts himself to plunge his country into the most expensive and ruinous establishments. In the two first years of his presidency, he has contrived pretences to double the annual expense of government by useless fleets, armies, sinecures, and jobs of every possible description.*" Here is an accusation the truth or falsehood of which may be determined by the expressions themselves. I shall abide by them. I ask you if it be possible for the President to contrive pretences to double, or even increase the expense of government? Has he the whole and entire control of the government? Are there not two branches of the legislature who have uncontrollable power over all expenditures and appropriations? Is he not bound to execute when the legislative authority has directed? Can any appropriation be made but according to an existing law? This attempt to criminate the executive branch of the government for exercising power which you well know, it could not exercise because it exclusively belongs to the legislature, is false, scandalous and malicious. "*By sending these ambassadors to Paris Mr. Adams and his British faction, designed to do nothing but mischief.*" These are expressions of malignity; they are used as terms of contempt. These words taken separately and unconnected with any other part of the book, might not be libellous; but when considered with what he says in several other passages, it is certainly libellous. In several parts of this book, the President is endeavored to be held up to the view of the people at large, as desirous to enter into a war with France. The author might have had in his mind, when writing his book, that the sending ambassadors to Paris to negociate a peace, might counteract his misrepresentations, and prevent any belief in his assertions; that the President willed to plunge his country into a war with that country. Under this apprehension, fearful that this embassy would have a good effect, and would destroy the credit of his charges, he says, that nothing was intended by it, but mischief; nor does he introduce the President by himself, but unites with him, those who concurred with him in opinion, whom he malignantly calls, by the contemptuous epithet, "*British faction.*" Take all into consideration, his many assertions that the President wished *a war with France* — his endeavors to impute a mischievous design to the President, in his attempts at negociation, and you will find them as contradictory as they are malevolent. If those expressions be true *these* must be false; if he were desirous to involve his country in war with France, he would not attempt to send ministers of peace; if he sent ministers of peace to reconcile all differences with that country, he could not have been desirous to go to war with it. Can you believe the insinuation that the President was insincere? Can you believe that they were sent there for mischief? "*In that paper, with all the cowardly insolence arising from his assurance of personal safety.*" In several parts of this book, the President is represented as a champion, but here it is asserted by a necessary implication, that at the approach of danger he is a coward. There are many contradictions of this sort in this book. Whether this be false or true, there is no proof of its truth before you. "*With all the fury but without the propriety or sublimity of Homer's Achilles, this hoary headed incendiary this libeler of the governor of Virginia bawls out to arms, then to arms! it was floating upon the same bladder of popularity, that Mr. Adams threatened to make this city, the centrical point of a bonfire.*" No language can be stronger than it is — he represents the President to be of so malignant a heart, that he would set the match to his happy country, and consume it. These extremely strong harsh terms are used, without any proof to support

them—if these be not false, scandalous, and malicious, I know not what can be so; and will close the book and speak no more.

Again, the picture is attempted to be heightened. "*Reader, dost thou envy that unfortunate old man, with his twenty five thousand dollars a year: with the petty parade of his birth day, with the importance of his name, sticking in every other page of the statute book. Alas! he is not an object of envy, but of compassion and horror! With Connecticut, more than half undeceived; with Pennsylvania disgusted; with Virginia alarmed; with Kentucky holding him in defiance, having renounced all his original principles, and affronted all his honest friends, he cannot enjoy the sweet slumbers of innocence*" He that cannot enjoy the *sweet slumbers of innocence* must be hindered by guilt and cannot therefore be envied; if indeed he were to continue under this charge, by your verdict, he could not be envied: but of these most violent and indecorous charges there is not the slightest proof. What then can be more malicious, than this accusation, which describes him as covered with guilt? '*It is happy for Mr. Adams himself as well as for his country, that he hath asserted an untruth.*'

The President is represented as a felon, a murderer, a traitor, and an incendiary! But not contented with imputing to him this accumulation of crimes, he makes him a finished character, and calls him a *liar*. Is it slander or not to call him a thief, murderer, incendiary, and liar? He has not proved that the President deserves any of these epithets. Is not this slander malicious? Can it be otherwise? Your verdict therefore must be, that he is guilty.

"*In the midst of such a scene of profligacy, and of usury, the President has persisted as long as he durst, in making his utmost efforts for provoking a French war.*"

Here is a positive repetition, of what was before promised. Here is an affirmative declaration of what was before insinuated. He takes vast pains to vilify the President, in strong terms and round periods. It is not sufficient, that he is called a murderer, traitor, felon, incendiary, but the people must be told in strong terms, that he is wantonly dissipating their funds and that all his acts are acts of infamy and wickedness!

"*For although Mr. Adams were to make a treaty with France, yet such is the grossness of his prejudice, and so great is the violence of his passions that under his administration, America would be in constant danger of a second quarrel.*"

I confess that when the period of a new election arrives, every citizen has a right to withdraw his vote from the existing chief magistrate, and to tell the world, "*I will give my confidence* to another." But this right does not warrant him to traduce and defame the person now in office. Here the traverser by representing the President as a man of such gross prejudices, and violent passions, says to the citizens of the United States, 'do not re elect the present president, for he will involve you in war." You cannot say that this is true, therefore it must be false, scandalous, and malicious.

"*When a chief magistrate is, both in his speeches and in his newspapers, constantly reviling France, he can neither expect nor desire, to live long in peace with her. Take your choice then between Adams, war and beggary; and Jefferson, peace and competency.*"

I have told you, and again repeat, that it is the peculiar privilege of every citizen of this happy country to place confidence in whom he pleases, and at the constitutional periods of making new elections, to withdraw his confidence from a former representative, and place his trust in another; and even expatiate on the virtues of the new candidate; but this does not warrant him to vilify, revile and defame another individual, who is a candidate.—Cannot a good thing be said of one individual, without saying black and damnable things of another? Is it necessary, in order to recommend one man, to the presidential office, that you should charge another with bringing on his country war and beggary? The whole forms a perfect chain of malice, falsehood and slander.

The attorney for the United States having concluded the counſel for the traverſer introduced col John Taylor (of Caroline county) as a witneſs, and he was ſworn. but at the moment the oath was adminiſtered, the judge called on them, and desired to know what they intended to prove by the witneſs

They anſwered that they intended to examine col. Taylor, to prove that he had avowed principles in his preſence which juſtified Mr. Callender, in ſaying that the President was an ariſtocrat—that he had voted againſt the ſequeſtration law, and the reſolutions concerning the ſuſpension of commercial intercourſe with Great Britain; by which he defeated every effort of thoſe who were in favor of thoſe beneficial meaſures, which were well calculated to promote the happineſs of their country.

The judge demanded a ſtatement in writing, of the queſtions intended to be put to the witneſs.

Mr. Nicholas remarked, that the traverſer was at leaſt entitled to every indulgence, which had been ſhewn to the attorney for the United States—that this requiſition had not been made of the attorney, when he introduced witneſſes on behalf of the United States, nor was it according to the practice of the ſtate courts—that he wiſhed the witneſs to ſtate all he knew, that would apply to the defence of his client—that he did not know what the witneſs would preciſely prove, but that if the court inſiſted upon it, he would furniſh a ſtatement of the queſtions, which he ſhould firſt propound, but requested that he might not be conſidered as confined in the examination of the witneſs, to the questions ſo stated.

Judge Chaſe. It is right to state the questions intended to be propounded to witneſſes. in all caſes, and the reaſon is extremely plain. Juries are only to hear legal evidence, and the court are the only judges of what is or is not legal evidence, to ſupport the iſſue joined between the parties. To ſay that you will correct improper evidence, after it ſhall have been given, is improper, becauſe illegal evidence, once heard, may make an undue impreſſion; and therefore ought not to be heard at all by the jury; and the attorney for the United States had, in opening the cauſe, stated the purpoſe for which he introduced the witneſſes.

Judge Chaſe, having received a statement of the questions meant to be put* and which were propounded by Mr Nicholas, declared colonel Taylor's evidence to be inadmiſſible. No evidence ſaid the judge, is admiſſible, that does not go to juſtify the whole charge. The charge you mean to juſtify by this witneſs, as I underſtand you is, that the President is a profeſſed ariſtocrat—and that he has proved ſerviceable to the Britiſh interest You muſt prove both theſe points, or you prove nothing. Now as you do not attempt to prove the whole of one ſpecific charge, but only a part of it, your evidence cannot be received—this is the law, both in civil and criminal caſes—he who juſtifies, muſt juſtify an entire charge or elſe his defence does not amount to a juſtification in law. You have not proved the truth of any particular charge, though in order to excuſe it, you muſt prove the whole—to prove the truth of a part only, is not proving what is material. The attorney propoſed to prove his indictment. He has exhibited his oral and written testimony to prove it. The traverſer excuſes himſelf from the imputed guilt, by averring that *part* of ſome of the charges is true. Is this evidence proper, when the *whole* charge is in iſſue. If it be, the proof of a very trivial part of an important indictment, would excuſe from the whole; but I pronounce the law to be otherwiſe, and take the reſponsibility on myſelf and riſk my character on it. It may be ſaid, that this will preclude the party from the privilege of his testimony, *but this will only be a misrepresentation, it precludes him from no legal benefit.* My country has made me a judge, and you muſt be governed now, by my opinion, though I may be mistaken; but if I am not right, it is an error in judgement,

* *Queſtion 1ſt.* Did you ever hear Mr. Adams, express any opinion favorable to monarchy and ariſtocracy; and what were they?.

Queſtion 2d. Did you ever hear Mr. Adams, whilſt Vice President, express his diſapprobation of the funding ſyſtem?

Queſtion 3d. Do you know whether Mr. Adams did not, in the year 1794, vote againſt the ſequeſtration law, and the bill for ſuſpending commercial intercourſe with Great Britain.

and you can state the proceedings on the record so as to shew any error, and I shall be the first man to grant you the benefit of a new trial by granting you a writ of error, in the supreme court. It is on these grounds, that I reject the evidence of the gentleman. The very argument assigned by the young gentleman, who spoke last has convinced my mind that I am right. The offered testimony has no direct and proper application to the issue—it would deceive and mislead the jury; an argumentative justification of a trivial, unimportant part of a libel, would be urged before a jury, as a substantial vindication of the whole. You would, by misleading the jury under such illegal testimony, destroy public treaties, and public faith; and nothing would be more uncertain than law were such an illegal excuse admitted in courts of law.

Mr. Nicholas suggested that it might be proper to prove one part of a specific charge by one witness and another part by another, and thereby prove the charge.

Judge Chase, in answer, repeated some of his former arguments, and added that the very argument suggested by the young gentleman who spoke last, convinced his mind, that it would be improper to admit the testimony now offered to the court; that to admit evidence, which went to an argumentative establishment of the truth of a minute part of the charge, by one witness, and another minute part by another witness, would be irregular and subversive of every principle of law; that it had no relation to the issue; that it was a popular argument, calculated to deceive the people; but very incorrect.

Here judge Griffin being called upon by judge Chase to deliver his opinion on the question before the court, declared that he concurred with his brother judge.

Judge Chase then observed—this is a new doctrine, inculcated in Virginia. You have all along mistaken the law, and press your mistakes on the court. The United States must prove the publication, and the fallacy of it. When these things are done, you must prove a justification, and this justification must be entire and complete, as to any one specific charge; a partial justification is inadmissible. I am happy to find, that my brother judge Griffin, concurs with me in opinion.

The counsel for the traverser, again desired to be heard on the subject.

Mr. Hay spoke thus. The question before the court is, whether this evidence goes to prove the truth of the whole charge? The opinion given by the court, I understand to be, that evidence cannot be produced by the traverser, to prove the truth of a part of a charge; but if evidence could be adduced to prove the whole, then such evidence would be admissible. One specific charge is two-fold; that the president is an aristocrat; and that he proved serviceable to the British interest. The evidence, we suppose, will support this charge, we wish to prove the truth of the whole charge if we can, though I do not know that it is in our power. The evidence, we have reason to believe, goes first to prove that he *is* an aristocrat, and secondly that he *did* prove serviceable to the British interest; if the testimony *will* in fact prove these two points, whatever may be the opinion of the court, I do not hesitate to say, that in my estimation, it will fully excuse and justify the traverser; if we can prove that the president has avowed aristocratical sentiments in conversation, and that he did in reality, prove faithful and serviceable to the British interest, the traverser must be acquitted of this charge. As to the first part, I can prove by the words of Mr. Adams, published by himself, in his book called a defence of the American constitutions, that he thinks a government of three parts, a king, lords and commons, the best in the world. Suppose in addition to this, it could be proved, that a law passed the house of representatives of the United States, to sequester British property; and suppose that one half the senate of the United States, were in favor of it; and that the policy of passing the law, was advocated by the best and wisest men in this country, who have the same pretensions to patriotism and virtue, that Mr. Adams has, but that its passage was prevented by the casting vote of Mr. Adams as speaker of the senate, would not the traverser be justified as to this charge? Would it not demonstrate, that he proved serviceable to the British interest? By the answers to the

first and third queſtions, we expect to prove both theſe points.

Here Mr. Nelſon objected to the introduction o ſuch teſtimony, as being altogether inadmiſſible; that gentlemen ough to reflect, that if ſuch evidence as this was to he received, any other teſtimony, however irregular or improper, might alſo be admitted; and par icularly that it would be a departure from the u iverſal princip.l of law, which required the production of the beſt teſtimony, which the nature of every caſe admitted, and that the journals and records of congreſs, were the beſt eviden e of what votes had been given on any ſubject diſcuſſed before that body.

Judge Chaſe then addreſſed himſelf to Mr. Nelſon, thus—Being very much preſſed by the young gentlemen, who defend the traverſer, to admit this teſtimony, I was going to recommend to you, to permit thoſe queſtions to be put to the witneſs, though they are certainly irregular. I wiſh you could conſent that they ſhould be propounded.

Mr. Nelſon declared that he did not feel himſelf at liberty to conſent to ſuch a departure from legal principles.

Mr. Wirt then roſe and addreſſed the jury—He premiſed that the ſituation of the defendant and his counſel was extremely embarraſſing; that as Mr. Callender had been preſented, indicted, arreſted and tried, during this term, he had not been able to procure the teſtimony eſſential to his defence, nor was his counſel prepared to defend him; and he inſinuated that the conduct of the court, was apparen ly precipitate, in not poſtponing the trial until the next term.

Judge Chaſe told him he muſt not reflect on the court.

Mr. Wirt explained—that his object was not to reflect on the court, but to apologize to the jury, for the weakneſs of a defence which he was about to make.

The judge, after obſerving that his apology included the very reflection he denied, told him to proceed in his cauſe.

Mr. Wirt. Gentlemen of the jury, I am prevented from explaining to you the cauſes which have conſpired to weaken our defence, and it is no doubt right, that I ſhould be prevented, as the court have ſo decided: permit me then, gentlemen, to paſs on abruptly to the law, under which we are indicted. You will find that a material part o your enquiry will relate to the powers of a jury over the ſubject committed to them, whether they have the right to determine the law, as well as the fact. In Virginia, an act of the aſſembly has adopted the common law of England—that common law, therefore, poſſeſſes in this ſtate all the energy of a legiſlative act. By an act of congreſs, the rules of proceedings in the federal courts, in the ſeveral ſtates, are directed to conform to the rules of the ſtates in which ſuch court may be in ſeſſion; by that act of congreſs, it is therefore provided, that the practice of the courts of Virginia ſhall be obſerved in this court: to aſcertain your power therefore, as a jury, we have only to refer to the common law of England, which has been adopted in the laws of this ſtate, and which defines the powers of juries in the ſtate courts. By the common law of England, juries poſſeſs the power of conſidering and deciding the law as well as the fact, in every caſe which may come before them. I have no doubt but I ſhall receive the correction of the court, if I am wrong in theſe poſitions. If then, a jury in a court of the ſtate would have a right to decide the law and the fact, ſo have you. The federal conſtitution is the ſupreme law of the land, and a right to conſider the law, is a right to conſider the conſtitution: if the law of congreſs under which we are indicted, be an infraction of the conſtitution, it has not the force of a law, and if you were to find the traverſer guilty, under ſuch an act, you would violate your oaths.

Here Judge Chaſe interrupted him, and ſpoke thus:—Take your ſeat ſir, if you pleaſe. If I underſtand you rightly, you offer an argument to the petit jury, to convince them that the ſtatute of congreſs, entitled, "An act, &c." commonly called the ſedition law, is contrary to the conſtitution of the United States, and therefore void. Now I tell you, that this is irregular and inadmiſſible; it is not competent to the jury to decide on this point; but if you addreſs yourſelves, gentlemen, to the

court, they will with great pleasure hear any reasons you may offer, to shew that the jury have the right contended for.—Since I came into the commonwealth, I understood that this question would be started, and that the power of a jury to determine the validity or nullity of a law, would be urged. I have, therefore, deliberately considered the subject, and I am ready to explain my reasons for concluding that the petit jury have not a right to decide on the constitutionality of a law, and that such a power would be extremely dangerous.—Hear my words, I wish the world to know them, my opinion is the result of mature reflection.

Here he read part of a long opinion, to shew that the jury had not the right contended for; after which, he told the counsel for the traverser, that he would hear with pleasure, any arguments which could be urged, to shew that he was mistaken.

Mr. Wirt. I shall state to the court in a few words, the reasons which have induced me to ascribe this right to the jury. They are sworn to give their verdict according to the evidence, and the law is evidence—if the jury have no right to consider the law, how is it possible for them to render a general verdict? Suppose, for example, an indictment for murder—how can the jury pronounce a verdict of guilty or not guilty, if they have not the right as well of ascertaining whether the facts have been committed, as whether they amount to a breach of law? This doctrine is too clearly established, to require the aid of authorities.

Judge Chase. No man will deny your law—we all know that juries have the right to decide the law, as well as the fact—and the constitution is the supreme law of the land, which controls all laws which are repugnant to it.

Mr. Wirt. Since then the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution.

Judge Chase. A *non sequitur*, sir.

Here Mr. Wirt sat down.

Mr. Nicholas then addressed the court. I am so much under the influence of duty, that though I am in the same situation with the gentleman who preceded me; and though the court seem to be impressed with the opinion, that the jury have no right to determine on the constitutionality of an act of congress, yet arduous as the task may be, I shall offer a few observations, to shew that they have this right. I intend to defend Mr. Callender by the establishment of two points.

First, that a law, contrary to the constitution is void; and secondly, that the jury have a right to consider the law and the fact. First, it seems to be admitted on all hands, that when the legislature exercise a power not given them, by the constitution, the judiciary will disregard their acts. The second point, that the jury have a right to decide the law and the fact, appears to me equally clear. In the exercise of the power of determining law and fact, a jury cannot be controlled by the court. The court have a right to instruct the jury, but the jury have a right to act as they think right; and if they find contrary to the directions of the court, and to the law of the case, the court may set aside their verdict and grant a new trial.

Judge Chase. Courts do not claim the right of setting aside the verdict in criminal cases.

Mr. Nicholas. From this right of the jury to consider law and fact in a general verdict, it seems to follow, that counsel ought to be permitted to address a jury on the constitutionality of the law in question—this leads me back to my first position, that if an act of congress contravene the constitution of the United States, a jury have a right to say that it is null, and that they will not give the efficacy of a law to an act which is void in itself; believing it to be contrary to the constitution, they will not convict any man of a violation of it: if this jury believed that the sedition act is not a law of the land, they cannot find the defendant guilty. The constitution secures to every man a fair and impartial trial by jury, in the district where the fact shall have been committed: and to preserve this sacred right unimpaired, it should never be interfered with. If ever a precedent is established, that the court can control the jury so as to prevent them from finding a general verdict, their important right,

without which every other right is of no value, will be impaired, if not absolutely destroyed. Juries are to decide according to the dictates of conscience and the laws of the country, and to control them would endanger the right of this most invaluable mode of trial.

I have understood that some reliance would be placed on two decisions of the courts of this state, in which they determined two acts of our legislature to be unconstitutional; but when we come to analize these decisions, they will not authorise the belief, that the jury have not the right I contend for, they only prove that the judiciary can declare legislative acts to be unconstitutional; they do not prove that a jury may not have a similar power.—In the case of Kamper vs. Hawkins, they refused to carry into effect a law which gave the district courts a right to grant injunctions in certain cases, because they thought it unconstitutional, and that the courts had no power to act, under the law: that case did not turn on a relative view of the power and connection of a court and jury; it was a question whether the courts would exercise a particular jurisdiction and carry into effect, that act, as practised by the judges in chancery, but they never decided that a jury had not a right to determine on the constitutionality of a law, nor could a question about this right have arisen in those two cases; the court said that the judiciary were not bound to carry into effect an unconstitutional law. I do not deny the right of the court to determine the law, but I deny the right of the court to control the jury; though I have not bestowed a very particular attention on this subject, I am perfectly convinced that the jury have the right I contend for; and consequently that counsel have a right to address them on that subject.

The act of congress to which I have alluded, appears to have given to the jury the power of deciding on the law and the fact; and I trust, that when this whole question comes into consideration, the court will suffer the counsel for the traverser to go on to speak to the jury, subject to the direction of the court.

Mr. Hay rose after Mr. Nicholas concluded, and observed, that he was prepared to address the court on the extent of the powers of the jury, in the case at bar. The arguments, said he, which I shall urge, I shall address to the court, not wishing to be heard by the jury, or to be attended to by the numerous auditory now present. A question of great importance depends on this decision; much of the public happiness, of the public peace, of the public liberty, depends on the final decision which shall be pronounced on this subject. I entertained doubts at first, but a calm and dispassionate enquiry, and the most temperate reflection, have led me to believe and to say, that the jury have a right to determine every question which is necessary to determine, before sentence is pronounced upon the traverser. I contend that the jury have a right to determine whether the writing charged in the indictment to be false, scandalous and malicious, be a libel or not. If this question should be decided in the affirmative by the court, I shall endeavor to convince the jury, that it is not a libel, because there is no law in force under the government of the United States, which defines what a libel is, or prescribes its punishment. It is an universal principle of law, that questions of law belong to the court, and that the decision of facts belong to the jury; but a jury have a right to determine both law and fact in all cases.

Here judge Chase asked Mr. Hay, whether he meant to extend his proposition to civil as well as criminal cases, and told him, that if he did, the law was clearly otherwise.

Mr. Hay answered, that he thought the proposition universally true, but it was only necessary for him to prove it to be true in cases of a criminal nature.

Judge Chase again interrupted Mr. Hay, and briefly expressed his opinion of the law. And then Mr. Hay folded up and put away his papers, seeming to decline any further argument.

Judge Chase requested him to continue his argument, and added—"please to

proceed, and be aſſured that you will not be interrupted by me."

Mr. Hay refuſed to proceed.

Judge Chaſe obſerved, that though he thought it his duty to ſtop the counſel, when miſtaking the law, *yet he did not wiſh to interrupt them improperly*; that there was no occaſion to be captious; and concluded thus, "act as you pleaſe, ſir."

And after declaring that he wiſhed the ſentiments and opinion which he was about to deliver to be publiſhed and known to the world, he read an opinion ſhewing that the jury had not a right to determine on the conſtitutionality of an act of congreſs.

After the judge had pronounced this opinion he explained the iſſue to the jury. He ſaid that the fact of publication muſt be proved, and it muſt appear to be falſe, ſcandalous and malicious. He then ſtated the length of time in which Mr. Adams had been in the ſervice of his country, and the eminent ſervices that he had rendered it, and added that he was extremely happy that Callender was not a native American. The jury then retired, and after an abſence of about two hours, they returned into court and pronounced a verdict of GUILTY.

David Roberiſon croſs-examined by Mr. Randolph.

Q. Did you ſee any other conſultation between the judges than you have mentioned?

A. I did not obſerve more.

Q. Have you not for a long time been an attorney and alſo a proſecutor?

A. I have practiced law for more than ſixteen years, and am proſecutor in two diſtricts, having criminal juriſdiction.

Q. What is the mode of proceeding in criminal caſes, not capital?

A. Moſt of the miſdemeanors which are committed in thoſe diſtricts are aſſaults and batteries. The firſt proceſs is a ſummons, and upon the return of that, if the party does not appear, then a capias iſſues. I do not recollect but two caſes when impriſonment was the puniſhment and the parties were in court. One of them was a conſpiracy to poiſon and the other an attempt to burn a houſe, and both were puniſhed with fine and impriſonment.

Q. When the ſummons is iſſued, when is it returnable?

A. To the next court.

Q. Have you ever known an inſtance when a party was ruled to trial at the firſt term?

A. I have known caſes of felony tried immediately after the preſentment was found.

Q. Have you known any caſe leſs than felony ſo tried?

A. I never have.

Q. Did you hear any offer, on the part of the court, to poſtpone the trial of Callender?

A. I came into court at the concluſion of the laſt motion for a continuance, I therefore did not hear it.

Q. Is it in the power of the court to iſſue what proceſs they pleaſe?

A. I not only think it in the power, but I think it the duty of the court, to iſſue what proceſs they conceive to be moſt proper.

Q. In thoſe two caſes which you have mentioned, was there any motion to continue the cauſes?

A. I do not recollect that there was.

Q. Did the parties appear by counſel?

A. They did.

Q. In what manner were they proceeded againſt?

A. The one was proceeded againſt by an information and the other by indictment.

The court then adjourned.

MONDAY, February 18, 1805.

The court being called as uſual, Mr. Randolph ſaid he wiſhed to *croſs-examine William Marſhall.*

William Marſhall.

Q. Have you ever known an inſtance of a court's adjourning for more than from day to day?

A. I have never known the circuit court to adjourn longer but once, and that was from a Tueſday to the Saturday following. The gentlemen of the bar were then engaged in the ſuperior court in Richmond, and the adjournment took place to accommodate them. I have never known an inſtance of an adjournment taking place and another court being held in the intermediate time.

Queſtions by Mr. Harper.

We have heard much of the political characters of a number of gentlemen; what was the political character of Mr. Nelſon, the attorney, at the time Callender was tried?

A. He was oppoſed to the then adminiſtration.

Q. Have you known inſtances where the courts have decided, before judge Chaſe went to Richmond, that the ſtate laws, did not govern in the manner of aſſeſſing the fine?

A. There had been two inſtances of indictment before the trial of Callender, one before judge Iredell and the other before judge Wilſon, and they both decided that the court would aſſeſs the fine.

Q. In what manner did they mention this?

A. The jury were about to be ſworn, and the ſtate law was mentioned, but judge Wilſon immediately declared that it was the province of the court to aſſeſs the fine. There was no verdict in this caſe, but there was, in the caſe in which judge Iredell preſided, a general verdict of guilty, but the judgment was afterwards arreſted for ſome defect in the indictment.

Q. Did the counſel contend for the right of the jury to aſſeſs the fine?

A. The point was mentioned by the counſel, but was not argued.

Q. Are you not proſecutor of the court held in Richmond?

A. I am.

Q. Have you not known a capias to have iſſued, in caſes of miſdemeanor, and the cauſe tried at the firſt term?

A. I recollect a capias once to have iſſued; but the cauſe was not tried at the firſt term. I have repeatedly tried caſes of miſdemeanors at the firſt term.

Q. Did you try any of them when a motion was made for a continuance?

A. Generally when a motion was made for a continuance I ſuffered it to take place; but I never conſidered it as a matter of right.

Q. Is the court you ſpeak of created by an act of the legiſlature?

A. It is.

Q. Do you recollect an inſtance where a motion was made for a continuance, and yet the caſe tried at the firſt term?

A. I do, it was the caſe of a man who was preſented for receiving a hogſhead of tobacco out of a dray driven by a negro, a motion was made for a continuance, but it was refuſed, and the jury fined him one hundred dollars, and the court ſentenced him to be impriſoned for ſix months.

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James Winchеſter examined by Mr. Harper.

Q. Is it not the practice in Maryland to adjourn courts?

A. It has been a conſtant practice ever ſince I have been acquainted with the courts for them to adjourn to any time they thought proper. I was a ſhort time clerk to the circuit court of Maryland; I was afterwards a member of the bar, and, ſince the year 1798, have been diſtrict judge, and I have never heard their right to adjourn diſputed. The ſtate courts of Maryland are in the conſtant practice of adjourning.

Q. Do they try cauſes at the adjourned courts?

A. Certainly they do; but I have no recollection of ſeeing a criminal tried at one of them.

Q. Do you not know that judge Chaſe once adjourned the court in Maryland and went to hold a court in Delaware?

A. I think I recollect that he once did.

Queſtion by Mr. Key.

Was there not an adjournment of the court from May to December?

A. There was.

Queſtion by Mr. Randolph.

Have you ever known any other of the judges of the circuit court to do this, except judge Chaſe?

A. I do not recollect.

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William Rawle examined by Mr. Harper.

Q. Is it not the practice for the circuit courts to adjourn?

A. The firſt time I recollect the ſubject to have been diſcuſſed was when Mr. Jay, the then chief juſtice, preſided. Some occaſion produced a wiſh for an adjournment. The judges called me up to the bench and requeſted me to examine whether they had the power to do it. I accordingly examined the act of congreſs, and told the court that in my opinion they had a right to adjourn, as the length of their ſeſſion was not limited by law, and

both the judges were of the same opinion. The next instance that I remember, was in the year 1795, when the trials of some of the insurgents lasted until 3 or 4 o'clock in the morning and the court did not meet the next day. In the year 1804, on my motion, judge Washington adjourned the court from May until some day in July.

Question by Mr. Hopkinson.

Was it not contemplated to adjourn the court last summer until January?

A. It was contemplated, provided the fever should be in Philadelphia.

Mr. Harper. Previous to our examining witnesses to prove the practice of issuing capias in Virginia, I must do justice to Mr. Nicholas. I stated that we should be able to prove that he ordered a capias in a case not capital. The record which I have received does not warrant that position. We will now call Mr. Edmund I. Lee to shew what has been the practice in that part of Virginia, where he practices.

Edmund I. Lee examined by Mr. Harper.

Q. What is the practice in Virginia with respect to the issuing of process?

A. I have practiced law in Virginia for nine years. My practice has been confined to the upper counties in that state. I have never been public prosecutor; but whenever I have been engaged in a criminal case, it was on the side of the defendant. In those courts, the process in cases not capital, and where the party is not proceeded against by way of indictment, is to issue a summons. There are some offences which are tried solely by the court, without the intervention of a jury, such as profane swearing and sabbath breaking. When the grand jury presents an offence, in which the fine does not exceed five dollars, a summons issues. There are some offences which may be prosecuted in the district courts, where the penalty does not exceed 20 dollars, there a summons issues. There are some proceeded against by way of information, and there a summons issues; but in the courts in which I practice, I have never known a summons to issue for the party to appear and answer to an indictment for any offence. The practice is, when a person is presented for an indictable offence, for the attorney to send up an indictment, and upon its being returned a true bill, a capias is ordered to issue upon the indictment. I have had occasion to make the point, but the courts have universally determined that under the words of the law, "other proper process," they had the power to award a capias. In the district courts I have known a capias to issue in the first instance on an indictment, for an assault and battery.

Q. Has not the circuit of the district of Columbia, sitting in Alexandria, when the laws of Virginia are in force, determined that a capias was the proper process.

A. The court did so determine and Mr. Mason, the prosecutor, has uniformly issued a capias on all indictable offences.

Q. Is not a capias the only mode of arrest in Virginia?

A. I have never known any other.

Q. Where did Mr. Nelson, the late attorney, of the district of Virginia, reside?

A. He resided in York county.

Edmund I. Lee cross-examined by Mr. Randolph.

Q. Did you ever know a capias to issue upon a presentment?

A. I never did.

Q. At what time is a capias returnable?

A. The next court.

Q. Is bail demanded?

A. It is.

Q. Have you been much engaged in criminal prosecutions?

A. Only in the county courts.

Q. Did you ever hear of a bench warrant in Virginia?

A. I never have.

Q. Have you ever known a man to be taken up on a magistrate's warrant and held to bail?

A. I have in cases of assault and battery.

Gunning Bedford sworn and examined by Mr. Harper.

Q. Judge Bedford, was you on the bench with judge Chase, at a circuit court held at

New Caſtle, in the ſtate of Delaware, in June 1800?

A. I was preſent and ſat as one of the judges on the 27th and 28th of June, 1800, at the circuit court held at New Caſtle, at which court judge Chaſe preſided.

Q. What were the circumſtances which took place at the court?

A. On the morning of the firſt day of the court, I believe, I arrived at New Caſtle, about half an hour before judge Chaſe. The court met, and the grand jury being charged by judge Chaſe, retired to their room. After being there about half an hour, they returned into court, and being aſked by the clerk whether they had any preſentments or bills of indictment, they anſwered in the negative. The court then called upon the attorney to know whether he had any buſineſs to lay before the grand jury, and the reply was that he had none. The grand jury then aſked to be diſcharged. Judge Chaſe obſerved that it was not uſual to diſcharge the jury ſo ſoon, and turning round immediately to me, he ſaid, "Mr. Bedford, what is your uſual practice here, with regard to diſcharging grand juries." I replied that it depended on the buſineſs which they had to do. Judge Chaſe then addreſſed himſelf to the grand jury and ſaid, "but, gentlemen, I have been informed that you have in this ſtate a ſeditious printer who is in the conſtant habit of abuſing the government. His name is—but perhaps I may do injury to the man by mentioning his name. Have you ever attended to this ſubject?" The grand jury anſwered that they had not. Judge Chaſe obſerved that it was their duty to enquire, as he had given them the ſedition law in charge, and if there was any truth in what had been told him it was their duty to enquire into it. Judge Chaſe further obſerved, that it was high time that theſe ſeditious printers ſhould be corrected, that the happineſs, honor and proſperity of the country depended on it. He then aſked the attorney whether he could procure a file of the printer's papers. Some perſon at the bar obſerved that he could. The judge then aſked Mr. Read whether he would look over the file and ſee, by the next morning at ten o'clock, whether there was any thing in them. Mr. Read replied that he would. Judge Chaſe then told the grand jury that they muſt attend next morning at ten o'clock. They complained at not being diſcharged and ſaid that it was a buſy ſeaſon, but the judge ſaid that the buſineſs about which he had ſpoken was important and he could not diſcharge them. Other buſineſs was then done and the court adjourned. On our way to our lodgings, I obſerved to judge Chaſe, "why my friend, I believe you do not know where you are, the people in this place are not well pleaſed with the ſedition law." Judge Chaſe replied, "my dear Bedford, no matter where we are or among whom we are, we muſt do our duty." We went into court the next day and the grand jury after being called over retired to their room. In about an hour they returned and obſerved that they had made no preſentment. Judge Chaſe then aſked the attorney whether he had found any thing in the file of papers, who replied that he had found nothing except a piece againſt the judge himſelf. Judge Chaſe replied, "my ſhoulders are broad enough and I can bear any thing againſt myſelf, but where there is a violation of the laws, then will I interfere and have the offender puniſhed." The grand jury were then immediately diſcharged.

Q. Did judge Chaſe ſay any thing about a ſeditious temper being manifeſted in Delaware, among a certain deſcription of people?

A. I have no recollection of any thing of that kind. I have turned my attention to the ſubject ever ſince I ſaw the depoſition of Mr. Read, which was taken laſt winter for the uſe of the houſe of repreſentatives, but I cannot recollect any thing of it. The converſation which took place on the day of the tranſaction between judge Chaſe and myſelf, makes me believe that I could never have heard thoſe expreſſions, becauſe if I had I ſhould not have told him that I believed he did not know where he was, becauſe thoſe expreſſions would have ſhewn that he did. I ſaw a publication in the "Mirror of the Times," (the paper which had been examined by the attorney) on the fourth of July 1800, which contained a ſtatement

of the tranſaction. I thought the facts were much exaggerated, but there was not one word in the publication concerning the "ſeditious temper," which has been mentioned by Mr. Read.

Q. Was there any commanding in the manner of judge Chaſe to the attorney?

A. There was more the uſual manner of a court to the proſecutor.

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Gunning Bedford croſs-examined by Mr. Rodney.

Q. Was the title of the paper mentioned by judge Chaſe?

A. I believe not, I believe it was mentioned by me when the attorney was requeſted to procure a file of them.

Q. Was not judge Chaſe warm?

A. He generally expreſſes himſelf in a warm manner, but I ſaw nothing unuſual in his manner on that day.

Q. Did not an unuſual concourſe of people attend on the ſecond day?

A. I believe there was more than uſual.

Q. Did not judge Chaſe aſk whether there were not two printers?

A. He did when he ſaid that perhaps he might do the man an injury.

Q. Do you recollect judge Chaſe's expreſſions on that occaſion?

A. They were very much in theſe terms, "perhaps I am going too far, or I may do the man an injury, have you not two printers?" the anſwer was in the affirmative.

Q. Has it not been the practice in the circuit court of Delaware to diſcharge the grand jury on the firſt day of the term?

A. It is the uſual practice.

Q. Did not judge Chaſe obſerve when ſpeaking of the printer, "that if report did not belie him he came under the ſedition law"?

A. I did not hear him ſay ſo.

Q. Did you not hear judge Chaſe complain, that while he could not get any printer indicted in Delaware, that in Virginia he could not only get them indicted but convicted and puniſhed?

A. I do not recollect to have heard any ſuch expreſſions. I have ſome impreſſion on my mind of hearing judge Chaſe obſerve in a public company "that it was hard he could not get a ſingle man indicted in Delaware, while he could in every other place; but this obſervation was not in the language of complaint nor was it made to me, but was made by judge Chaſe in a public and in a jocular manner.

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Nicholas Vandyke ſworn and examined by Mr. Harper.

Q. Was you in the circuit court at New Caſtle in the month of June 1800, and what took place?

A. I attended the circuit court held at New Caſtle on the 27th and 28th of June 1800, as one of the bar. I was not preſent the firſt day when the court was opened but came in while the judge was delivering a charge to the grand jury. After this the grand jury retired to their chamber, they were there but a little while when they returned into court. I have no diſtinct recollection of a queſtion being aſked them by the clerk, I believe I was out at that time. I came to the bar while there was a pauſe, when judge Chaſe obſerved that ſince he had come to the ſtate, he had been informed that there was a ſeditious printer among them, and he conceived it his duty to call the attention of the grand jury to the ſubject. He appeared to be proceeding to ſtate the name of the printer but he did not, whether he ſaid that it might be improper for him to mention the name, or that he might do the man injuſtice, I do not remember. He then turned and aſked the attorney whether there were not two printers in the ſtate, who replied that there was. Some converſation then enſued: the ſubſtance was concerning an enquiry into the ſubject. The judge aſked the attorney whether he could not procure a file of the papers; but I did not hear him mention the title. Some perſon at the bar mentioned where a file could be procured, and the attorney ſaid that he would examine them, by the next morning. I then heard ſome obſervations among the jury about being diſcharged, and they requeſted the court to diſcharge them. Some of them ſtated that they were farmers and that it was a buſy ſeaſon. Judge Chaſe ſaid that the buſineſs to which he had called their attention was of conſiderable importance to the community, and he could not diſcharge them until the next day. This is all that I recollect to

have taken place on that day. I will not pretend to say that I have used the language of the judge.

Q. Did you hear any thing about a seditious temper which had manifested itself in Delaware?

A. I do not think I ever heard such expressions in the court house. I have endeavored to recollect any thing of the kind but I cannot, but I do not pretend to say but what they might have been used.

Q. Did you return into court before the conversation commenced?

A. I came into court when there was a pause, and then judge Chase proceeded as I have just stated.

Q. What was the manner of judge Chase in speaking to the attorney?

A. It was his usual manner which is earnest and warm, but there was nothing which appeared uncommon.

Q. Was there any thing imperative?

A. It did so strike me. I came into court the next day after the grand jury had retired. The attorney went up to them, and after a while the grand jury returned. A file of the paper called the "Mirror of the Times," was then laid on the bar table. The judge then enquired of the attorney if he had found any thing in them. The attorney replied that there was nothing which he could see except a publication against the judge himself. Judge Chase said "that has nothing to do with the subject; it is only for abusing the government that we are to take notice of printers, my shoulders are broad enough to bear all they can say about me." He then discharged the grand jury.

Archibald Hamilton sworn—examined by Mr. Harper:

Q. Was you present at the circuit court held at New Castle in June 1800, and what took place in court?

A. I left home on the morning of the court very early, with my father, who was the marshal of the district, and arrived at New Castle before judge Chase. When the court was opened, the grand jury were called and sworn, and having being charged by judge Chase they retired to their chamber. They remained there about an hour when they returned, and being asked by the clerk whether they had any presentments to make, they replied in the negative. The judge then asked the attorney whether he had any business to lay before them, who replied that he had not. Judge Chase said it was not usual for a grand jury to be so soon discharged, that perhaps some business might turn up. He observed that he had been informed that there was a seditious printer in the state who was in the habit of abusing the government, that his name was, he here said, "stop, I may commit myself and do injustice to the man, have you not two printers?" the reply that was there were. Judge Chase then asked the attorney whether he could not procure a file of the papers. Mr. Read replied that he did not take the paper. Some person observed that a file might be got of Mr. Cross Judge Chase then asked Mr. Read whether he would get and examine it. Mr. Read replied that he considered it his duty and would do it. The judge then told the jury that they must attend the next day. I was in court the next day when judge Chase asked the attorney whether he had found any thing in the papers, Mr. Read replied there was nothing but a piece against the judge himself and was handing up the file for him to look at, judge Chase said "no, sir, my shoulders are broad enough and can bear all the abuse, I am abused from one end of the continent to the other, but it is not of that I complain." He then discharged the grand jury.

Q. Did you hear any thing about a seditious temper?

A. There was no expression of that kind used. I was sitting by the side of the clerk, directly under judge Chase, and nothing of that kind could have been said without my hearing it.

Archibald Hamilton cross-examined by Mr. Rodney.

Q. What was the manner of judge Chase?

A. There was nothing particular in his manner.

Q. Did not the term end on the second day?

A. It did,

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Q. Are you certain that Mr. Read ſaid he conceived it his duty and would examine the file of papers?

A. He ſaid that he conſidered it his duty to enquire into ſuch matters.

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John Hall ſworn, examined by Mr. Harper.

Q. Was you in the circuit court at New Caſtle in June 1800?

A. I was.

Q. Was you there when the court met?

A. I was preſent when the grand jury returned from their room, being at a diſtance I could not hear every thing that paſſed.

Q. Did you hear any thing about the printer?

A. Judge Chaſe addreſſed himſelf to the grand jury and ſaid that he had been informed that there were certain ſeditious publications in the ſtate of Delaware, and aſked them whether they had come under their notice. The jury replied that it had not. Some converſation then took place between the judge and the attorney. The judge aſked whether there were not two printers, and whether the attorney could not procure a file of the papers.

Q. Did you hear judge Chaſe ſay that a highly ſeditious temper had manifeſted itſelf among a certain deſcription of people in Delaware?

A. I heard nothing of that kind nor did I hear him mention the county of New Caſtle or town of Wilmington. On the morning of the 27th of June, the day on which the court met, I was applied to at Wilmington, by a doctor M'Mahon to know whether I had any of the papers called the "Mirror of the Times," he ſaid he wiſhed to preſent them to judge Chaſe, who was then on his way to New Caſtle to hold a court. This Dr. M'Mahon was at that time a juſtice of the peace and alſo was a grand juror.

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Samuel P. Moore affirmed—examined by Mr. Harper.

Q. Was you in court at New Caſtle in June 1800?

A. I was not in court when it met nor when the grand jury were charged. I did not attend particularly to any thing that took place of the firſt day. I attended the ſecond day, when the grand jury, after remaining out about an hour, returned to their box. The uſual queſtion was then aſked them and anſwered in the negative. Judge Chaſe then aſked the attorney whether he had found any thing. Mr. Read then laid hold of a file of papers and obſerved that there was a publication againſt "his honor." The judge obſerved that his ſhoulders were broad enough to bear all their abuſe, and that he only complained of their abuſing the government. He then diſcharged the grand jury.

Q. Do you know any circumſtances relative to the diſpoſition of Mr. Read?

A. I preſume the converſations which I have heard are not evidence, but they are confidential ones, and I hope the court will not oblige me to reveal them.

Mr. Harper.—My object is to diſcredit Mr. Read, by ſhewing acts of his at the time of taking his depoſition. If the witneſs is unacquainted with any ſuch circumſtances, we have been miſinformed—if it will oblige him to diſcloſe a confidential communication, we do not deſire him to anſwer. I withdraw the queſtion.

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Samuel P. Moore cross-examined by Mr. Randolph.

Q. Do you know any thing that will diſcredit Mr. Read?

A. I do not.

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Mr. Harper.—We come now to the eighth article, but previous to our examination of witneſſes, I wiſh to aſk a queſtion of Mr. Montgomery.

John Montgomery examined by Mr. Harper.

Q. Will you pleaſe to look at that paper, (handing him one) is that the publication you ſent to the preſs?

A. It is in the American of the 13th of June, 1803.

Q. Did you ſend any other on this ſubject?

A. I did not.

Mr. Harper.—We offer this publication in evidence.

From the AMERICAN.

Upon the liability to IMPEACHMENT *of* JUDGE CHASE, *for alledged* MISBEHAVIOR IN OFFICE.

"The judges both of the supreme and inferior courts, shall hold their offices during good behaviour." [Cons. sec. 1, art. 3]

THE charge, delivered by judge Chase to the grand jury, at the late circuit court of the United States, sketches of which have been given to the public, through the National Intelligencer, and the American, may be denounced as a violent and malevolent attack upon the present administration, the congress of the United States, and the legislature of Maryland. Judge Chase seemed, on this occasion, to have exceeded the brawling Samuel Chase, for incendiary, factious and turbulent language. He indicated from his expressions, and his manner, a strong and invincible desire to inculcate in the minds of the jury, and bye-standers, a thorough contempt for the administration; describing it weak, pusillanimous, relaxed, and not adequate to the due discharge of the important functions attached to it;—that its acts had not a tendency to produce the general happiness but had solely in its view, a continuance in *unfairly* acquired power.

To congress, he ascribed a wilful and flagrant violation of the constitution, in the repeal of the judiciary, and the consequent removal from office of the sixteen judges; that by this act, the constitution had received a mortal blow, as it totally demolished that independence in the judiciary, which the constitution contemplated to establish.

He reflected upon the legislature of Maryland, as having been guilty of a similar flagrant infraction of the state constitution, in the repeal of the late state judiciary law, and in both instances, ascribed to, and stigmatized the supporters of those measures, with motives subversive of the constitutions and governments, and destructive of, and dangerous to the tranquility, happiness and welfare of the community. He pronounced a severe invective against the general suffrage law, which was confirmed by the state legislature at the last session; the framers of the constitution, he observed, which that law, by its confirmation, altered, were men of integrity, talents and sound judgment; that the names of many of them were honorably enrolled in the journals of the old congress; but it was with regret he had to remark, that the degenerate sons of *some* of those distinguished characters, were the chief supporters of this destructive measure; thus letting down the august and dignified character of judge, to a level with that of a discontented electioneering reviler. He stated, that this general suffrage law, struck deep at the independence of the state judiciary; for as the state of Maryland and congress, had each, by a single repealing act, removed judges from their offices; and, as by the general suffrage act, every free male white person, having the qualifications of age and residence, is now intitled to the right of suffrage—although he may not have a property in, a common interest with, and an attachment to the community; that no person competent to discharge the important duties of a judge, with ability, would be found to accept of an appointment, which must be held at the will of such men as must necessarily be elected by such worthless voters.

He censured the late acts of the general government; and of the state government as precipitating the country into positive destruction; and that to complete the ruin, there was but one act remaining to be done and that was the confirmation of the bill, abolishing the court of appeals, and the general court, at the next session of the state legislature.

A representative government he gave a definition of, pictured its excellencies and in strong language spoke his admiration of it—but in agonizing tones expressed his regret, that our government, though intended to be representative, was fast verging to a *mobocracy*. He described, that in that country where were equal rights and equal laws, that is, laws equally administered, and that operate equally upon the rich and poor, *there* was freedom; but that that country was not *ours*; that *we* had no equal rights or equal laws.

Throughout he contended, that the great bulwark of the constitution, and safeguard of the government, was an independent judiciary; as it was now made a dependent and reponsible depart-

ment of government by the late proceedings of congrefs and legislature of Maryland, the conftitutions and governments muft fink into contempt.

He gave an opinion, that there might be freedom in a monarchy, alluding perhaps to the Britifh government, and flavery in a republic, with an allufion perhaps to our own government.

In a folemn and impreffive tone, he called upon the jury to paufe—to reflect on the awfully threatning crifis ; and when they returned to their homes, to make a firm ftand, and ufe their beft exertions to avert the impending evils, and fave their country—that we were reduced to this alarming fituation, by the people being misled by art, falfhood and mifrepreferitation ; and that by correcting the errors, thus occafioned among the people, the evil might ftill be difpelled, and good order be again reftored.

To give, from recollection, all the venom he difcharged upon this memorable occafion, is impoffible—the above are many of the prominent fentiments expreffed in the extrajudicial part of this extraordinary and inflammatory charge. From the whole tenor of it, it exhibited a next intent to produce effects, hoftile to the adminiftration, and to the majorities in congrefs, and in the legislature of Maryland, and in fact, to revolutionize the ftate. He appeared to be fo enveloped with the conceit of his popular electioneering powers, as to have loft all recollection of the univerfally received opinion, that to damn any political man, or meafure, it is only neceffary *for him* to advocate them, and to recommend them, is only *for him* to condemn. He feems alfo not to have been aware, that the adminiftration is popular ; that the repeal of the judiciary by congrefs, and thereby removing the fixteen fuperfluous judges, is a meafure that has been throughout the continent, generally approved ; that the act to repeal the judiciary of the ftate of Maryland has been by the general court, in the cafe of *ex-judge* Wittington againft judge Polk, pronounced conftitutional, and is a popular act in Maryland ; and that the general fuffrage law is very generally well received ; otherwife he would not, it is to be prefumed, have committed federalifm by thus publicly reviling thofe favorite meafures, and flandering their fupporters.

But is it to be tolerated in a government, like that we have the happinefs to live under ; can it be fubmitted to, that the facred bench of juftice fhall be erected into an electioneering tub ; that our courts of law, inftead of adminiftering impartial juftice, are to be made the vehicle for conveying to the people, turbulent electioneering fpeeches ; and inftead of judges of our courts giving fupport to the laws, that they, for electioneering purpofes, from the bench, fhould treat them with contempt, and and abufe the framers of them ; the judge fwears, that he will faithfully and impartially difcharge and perform all the duties incumbent on him as circuit judge, according to the beft of his abilities and underftanding, agreeably to the conftitution and *laws* of the United States ; he cannot then be in the due and faithful difcharge of the duties of his office, when in the act, from the bench, of abufing the laws, the government and the firft magiftrate in the government.

The judge laments, that by the late proceedings of congrefs, and the legislature of Maryland, the independency of the judiciary has been deftroyed—muft not *United America regret* that the dignity, the refpectability, and the honorable reputation of our courts of juftice have been proftrated to the duft, by conduct fo humiliating as that exhibited by the judge on this recent occafion ?

A judge of the fupreme court of the United States, under the 1ft fection of the 3d article of the conftitution holds his office *during good behavior*. A judge from the bench, debafes himfelf to a level with a turbulent, diffatisfied demagogue, and diffeminates fentiments to bring the government and laws into contempt and difrepute ; and in the act of giving a folemn official charge to the grand inquest of the United States, departs from his judicial duty in order *to excite discontent ;* aflfuredly fuch conduct cannot be conftrued *good behavior*, but muft be confidered fuch *misbehavior in office*, under the conftitution, as richly to merit a *forfeiture of office*. As it is *good behavior* in a judge to fupport the laws and adminifter them impartially, fo it muft

not only be *misbehavior in office*, but a *high misdemeanor* in a judge, in discharging an official duty, to assail the government and attempt to shake it to its very centre.

By the constitution, congress have the sole power by impeachment of removing a judge of the supreme court for *misbehavior in office*. It must rest then with the next congress to wipe off this defilement from our courts, by removing from the bench, the obnoxious rubbish which has occasioned it. The streams of justice running with a pure and steady current, diffuse blessings; choaked and impeded, and diverted to other channels, they excite contagion; but it is a pleasing reflection, that congress is armed by the constitution with powers to dispel the contagion, and to restore salubrity to our judicial atmosphere. And we have a pledge, that congress will exercise those important powers upon all necessary and proper occasions, from the firm and manly use of them, in the instance of the *pestiferous* midnight appointments of the six een judges.

When it is recollected that at the important crisis of adopting the federal constitution, the junto of opositionists in Baltimore, to which Mr. Chase was, with every nerve attached, repeatedly made the public avowal, that having *directly* used their best exertions to prevent the adoption and failed; that when the constitution should be in operation, it would be their object to undermine it *indirectly*, by getting themselves into offices under it; when this is recollected, it should seem that judge Chase still held this dangerous principle; for he has, by some means, warped himself into the high and dignified station of judge of the supreme and federal court, and makes himself in it, to *degrade the judiciary*, and in the discharge of his judicial duties he seems to exercise his best powers to bring the *other two departments of government into disrepute and contempt*—by speaking disrespectfully of the first executive officer and vilifying the proceedings of the legislature. A judge thus situated upon whose opinions hang the lives, liberties and properties of so many, and the tranquility of the community likewise, what an immense range of mischief may he effect: but before material injury is accomplished, it is devoutly to be hoped, he will be stripped of the powers of doing any.

Upon a former occasion, the legislature of Maryland, to gratify its insulted constitution, and to remove judge Chase from the bench of one of its courts, was constrained, as the only possible way to redress the indignity, to demolish the very court over which he presided, and restore the jurisdiction of the court to the channel from which it was originally taken. But the insult to the constitution of Maryland was inconsiderable, in comparison to the degradation sustained by the federal courts, by the extra-judicial conduct of this identical judge Chase It is such a conduct, and such a wilful abuse of office in a judge, that congress will not, it is expected, sanction by silence, but will rather deter an imitation and repetition of it, by making an impressive and solemn example in this instance.

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Mr. Harper, having read the paper as here inserted, said, "such is the temper in which this witness viewed the transaction about which he has given testimony. We shall now call witnesses to prove that Mr. Montgomery, in his zeal to get judge Chase impeached, has recollected facts which were observed by no other person present; and which certainly never did happen."

Here Mr. Randolph called on the President, to know, whether the witnesses for the prosecution were not under the protection of the court?

President. Most certainly they are—But counsel have a right to state that they will contradict and disprove what a witness has sworn. When they make such a statement, they do it under a great responsibility, and will be liable to strong censure, should they fail to support it. But if they completely support it by testimony, they can be subject to no blame.

Mr. Harper. I am fully apprized, sir, of the situation in which I stand, and am prepared to meet it.

William H. Winder was then called and sworn—But before he was examined, Mr. Harper rose and added, "in what I

have ſaid, ſir, reſpecting Mr. Montgomery's teſtimony, I do not wiſh to be underſtood as intending to charge him with intentional falſehood. We have nothing to do with his intentions, motives or belief; nor do we claim any right to enquire into them. It is enough for us to prove, that the facts to which he has depoſed, never did take place. The object of our teſtimony will be to ſhew, that he was very angry, and that in his anger he ſuppoſed himſelf to hear things which were never ſpoken.

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William H. Winder examined by Mr. Harper.

Q. Was you in the circuit court in Baltimore, in May 1803, when a charge was delivered by judge Chaſe?

A. I was preſent at the circuit court when the grand jury were impannelled, and when the charge alluded to was delivered. After ſpecifying the laws which were to come under the notice of the grand jury, judge Chaſe begged leave to detain them, while he made ſome general obſervations on the ſtate of affairs. He began with ſome obſervations on the nature of a republican government, and alſo went into a diſcuſſion of natural rights, which he denied to be true, and ſaid that liberty conſiſted in equal protection by the laws. He then animadverted on the repeal of the judiciary ſyſtem, and ſaid that it had a tendency to ſubvert the independence of the judiciary. He then adverted to ſome of the ſtate laws—he mentioned the law by which the diſtrict judges of the ſtate had been removed from office, and obſerved that one of the ſtrongeſt objections to that law was the motives by which it had been enacted, which motives had been animadverted on in Congreſs in the debate on the repeal of the judiciary ſyſtem. He then made ſome alluſion to the bill for the repeal of the general court and court of appeals of the ſtate—he ſaid he ſaw with regret, the ſons of ſome of thoſe men, who had reared the fair fabric, aſſiſting to demoliſh it—he alſo ſpoke againſt the general ſuffrage law. I believe I have ſtated my ideas of the charge in as ſtrong language as the judge uſed. I have never ſeen any publication of the charge ſince the firſt came out. I was, after being ſummoned, about to look over all thoſe publications, but upon reflection I conceived that I ſhould be better able to give my ideas of the charge without reading any of them, becauſe they might tend to miſlead me.

Q. Did you attend particularly to the charge?

A. I ſat in ſuch a ſituation that I could hear the whole, and did attend particularly to it. The court was held in a tavern, and the members of the bar were ſeated around tables. I ſat about the middle, directly facing the judge.

Q. Was the charge read from a paper?

A. I think the judge read the whole. I have no recollection that he read a whole ſentence without looking at the paper.

Q. Did you hear any thing about the preſent adminiſtration "being weak and relaxed, and not acting for the public good, but to preſerve themſelves in unfairly acquired power"?

A. I heard nothing of that kind.—Immediately after the delivery of the charge, a converſation took place at the bar concerning it. Some gentlemen complained of it as reflecting on thoſe perſons who were engaged in making the laws which had been ſpoken of, in too harſh terms, and the general impreſſion on my mind was, that I heard nothing which could give offence to any perſon.

Q. Did judge Chaſe mention the preſent adminiſtration at all?

A. I can anſwer negatively to that queſtion as ſtrong as I could do to any other.

Q. In what manner did he ſpeak of the degeneracy of ſons, was it in terms of reproach?

A. It appeared to me to be ſpoken of as a ſubject of regret. I ſaw the publication in the National Intelligencer, and it contained the account of the charge in as ſtrong language as the judge uſed.

William H. Winder cross-examined by Mr. Nicholson.

Q. In ſpeaking of the repeal of the judiciary ſyſtem, did you ſay that judge Chaſe made ſome comments on the motives of the members of congreſs?

A. It was on the law of Maryland about which he ſpoke of the motives of the members, which motives had been much animadverted on in congreſs.

Q. What did he say were the motives?

A. The motives were avowed at the time of the paſſage of the law, and were to get clear of the judges and not to amend the judicial ſyſtem. I believe that there was not the leaſt alteration in the ſyſtem.

Q. Was there not an alteration with reſpect to granting habeas corpus's?

A. Perhaps there might have been ſome alteration in that reſpect. I believe upon reflection that the ſum for which an habeas corpus was granted, was raiſed from twenty pounds ſterling to two hundred dollars.

Q. Did judge Chaſe recommend it to the grand jury to prevent the law for the abolition of the general court from being re-enacted?

A. I think judge Chaſe ſaid he would recommend it to the jury, to uſe their endeavors to prevent the paſſage of the law.

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James Winchester examined by Mr. Harper.

Q. Did you hear the charge which was delivered by judge Chaſe at Baltimore?

A. As has been already ſtated, the court ſat in a tavern. I attended as one of the judges of the court and ſat on the left of judge Chaſe, and the grand jury were on his right. My recollection of the charge does not materially vary from Mr. Winder's. The judge commenced with ſome general obſervations on the nature of government—he then adverted to the alteration of the conſtitution as to the right of ſuffrage, and the one contenplated for the abolition of the general court. He ſpoke incidentally of the evil likely to reſult from the repeal of the judiciary ſyſtem of the United States, and ſaid that it was ſtill more important that the independency of the ſtate judiciary ſhould be preſerved, when that of the federal judiciary had been ſo much impaired. I regretted that this political charge ſhould have been delivered, becauſe I had heard ſo much ſaid againſt them, and was very attentive to what paſſed. I am very confident, that all the political obſervations made were relative to ſtate regulations, ſave only the incidental mention of the law of the United States.

Q. Was the charge delivered from a paper?

A. Judge Chaſe has a kind of ſtanding form, as to that part of his charges which relates to the duties of the grand jury. He goes into a general definition of the oath of the grand jury, and then gives different laws in charge to them. In this inſtance he had a marble coloured book, and I obſerved that the charge was in the hand-writing of his ſon, Mr. Thomas Chaſe. Very frequently judge Chaſe pauſed at the end of a ſentence, and I thought his attention was directed to the book from the beginning to the end of the charge, particularly the political part of it.

Q. Were any expreſſions applied to the preſent adminiſtration?

A. My recollection is very ſtrong on the ſubject, and I do believe that the preſent adminiſtration was not mentioned. I am ſure that if any thing of that kind had fallen from judge Chaſe, it would have made a ſtrong impreſſion on my mind, and that he did not uſe any ſuch expreſſions. I never heard any charge from judge Chaſe reflecting on any adminiſtration.

Q. Has not the general tenor of his charges been to inculcate a ſubmiſſion to the laws and ſupport of the government?

A. Under the former adminiſtration, he recommended a ſupport of it; ſince the change has taken place, he has made no alluſion to the adminiſtration, but generally recommended a ſubmiſſion to the laws, and ſupport of the government.

Q. Is it the practice in Maryland for counsel to address the jury on the law in criminal cases?

A. I have never known but one instance of the kind, and that was a cause in which the secretary of the navy and myself were engaged as counsel. In that case the counsel did address the jury on the law, and a verdict was obtained, contrary to both law and justice.

Q. Have you ever seen counsel address the jury on the law after the opinion of the court was delivered?

A. I never have.

James Winchester cross-examined.

Q. Have you ever known an opinion delivered on a point of law, before the cause was entered into?

A. I never have.

Q. Did judge Chase recommend to the jury to prevent the enaction of the law for the abolition of the general court?

A. I do not recollect the language, but that appeared to me to be an inference drawn from the charge.

Q. Suppose in a capital case, you deemed the opinion of the court erroneous—would you not address the jury on the law?

A. If I conceived the opinion of the court to be palpably wrong, I suppose I should; but if the case was doubtful, I should think it improper for the counsel to attempt to argue the law contrary to the opinion of the court.

The court then adjourned.

TUESDAY, *February 19th*, 1805.

The court met as usual.

Thomas Chase sworn—examined by Mr. Harper.

Q. Look at the paper, exhibit No. 8 (handing it to him)—do you know the hand writing?

A. It is in my hand writing.

Q. Is this book (shewing him one) in your hand writing also?

A. It is.

Q. Did you copy the conclusion of this charge from any paper?

A. I copied it by the direction of my father (judge Chase) from the words, "Before you retire, gentlemen, to your chamber," to the words, "that their fathers erected," from a paper in his hand writing, into this book, before the session of the circuit court in the city of Baltimore, in the month of May 1803.

Question by Mr. Martin.

You never altered any part of this charge, Mr. Chase?

A. I never did.

Mr. Harper—This book contains the the whole conclusion of the charge delivered by judge Chase, and having proved the book, we shall offer it in evidence to this honorable court.

Philip Moore sworn—examined by Mr. Harper.

Q. Do you know this book?—(shewing one.)

A. Judge Chase was in the practice of delivering charges from a book like that, which was in the hand writing of his son, Mr. Thomas Chase.

Q. Are you not clerk of the circuit court of Maryland?

A. I am.

Q. Did you pay particular attention to the charge, and was it read from a book?

A. I paid particular attention to it, and I believe the judge read the whole from a book.

Q. Did you hear any thing said about the present administration?

A. I did not hear the judge on that occasion, nor in any charge, say any thing concerning the present administration.

Q. Have you any particular reason for supposing, that had any observations of that kind been used, you would have remembered them?

A. My impreſſions have always been favorable to the preſent adminiſtration; and the judge's have been the reverſe; therefore I think that ſuch obſervations muſt have ſtruck me.

—

Philip Moore cross-examined by Mr. Nicholson.

Q. Was there any recommendation to the jury to prevent the enaction of the law for the abolition of the general court?

A. I do not remember any.

—

Walter Dorsey ſworn—examined by Mr. Harper.

Q. Was you in court when the charge was delivered by judge Chaſe in May, 1803?

A. I was preſent when the charge was delivered, and was in ſuch a ſituation that I could hear the whole charge diſtinctly. Mr. Montgomery ſat next to me.—The firſt part of the charge was familiar to me; but I attended particularly to the political part.

Q. Did you hear any thing ſaid concerning the preſent adminiſtration?

A. My attention was particularly directed to the charge, on account of my ſeeing an editor preſent, and expecting that the charge would be the ſubject of newſpaper animadverſion; I have not the moſt diſtant recollection of any thing of that kind having been ſaid; Whether judge Chaſe did recommend it to the grand jury to uſe their endeavors to prevent the paſſage of the law for the abolition of the general court, or whether it was only an inference, I am unable to ſay.

Q. Was the charge read by judge Chaſe?

A. The whole of the charge appeared to be read from a book.

—

John Purviance ſworn—examined by Mr. Harper.

Q. Was you preſent when the charge was delivered by judge Chaſe to the grand jury at Baltimore in May, 1803?

A. I was preſent when the charge was delivered, and heard every word of it diſtinctly. I have always been accuſtomed to pay particular attention to the charges delivered by judge Chaſe.

Q. Did you hear any thing ſaid about the preſent adminiſtration?

A. I have no recollection of any mention being made of the adminiſtration, except ſo far as they might be connected with the repeal of the judiciary ſyſtem. I have not the ſlighteſt impreſſion of any expreſſions having been uſed reproachful to the preſent adminiſtration. After the charge was delivered, it was the ſubject of converſation. I then obſerved that I diſapproved of political charges; but that the ſentiments contained in the charge were unexceptionable; and it does appear to me that I ſhould not have expreſſed myſelf in this manner, had the judge's charge contained the expreſſions which it has been ſaid to have contained.

Q. Mr. Purviance, you have been accuſtomed to plead in the courts where judge Chaſe has preſided—Is it not his habit to interrupt counſel while ſpeaking, and ſtate his impreſſions?

Q. I have always noticed that judge Chaſe interrupted counſel very frequently, and I have always attributed it to a quickneſs of apprehenſion in the judge.

Q. Is he more in the habit of interrupting thoſe gentlemen with whom he is not on good terms with, than thoſe with whom he is?

A. I have never ſeen any difference.—I have remarked, with deference to the judge, that he frequently wanted patience, and would often interrupt counſel when he conceived the law to be againſt them; but I have noticed that when counſel have, in polite terms, inſiſted on going on, that he always heard them; and I have made the remark, that judge Chaſe has always manifeſted a diſpoſition to retract his errors, when convinced of them, almoſt unparalled in a judge.

—

Nicholas Brice ſworn—examined by Mr. Harper.

Q. Was you preſent in the circuit court at Baltimore, in May 1803, when the charge was delivered?

A. I was preſent, and attended particularly to the charge.

Q. Was it read?

A. It was read from a book.

Q. Have you a diſtinct recollection of it?

A. I cannot pretend to ſtate the words.

Q. Did judge Chaſe ſay any thing about the preſent adminiſtration being weak and relaxed?

A. I have not the ſlighteſt recollection of it.

Q. Have you any reaſon to ſuppoſe that you would have remembered ſuch expreſſions had they been uſed?

A. I was ſitting near Mr. John Stephen, with whom I am very intimate, although we differ in political ſentiments; and we had a long talk afterwards, concerning the charge, and had any ſuch expreſſions been uſed in the charge, I am certain it would have been mentioned, but nothing of that kind was hinted at.

—

James P. Boyd ſworn—examined by Mr. Harper.

Q. Was you in court when the charge was delivered, by judge Chaſe in May 1803?

A. I was preſent and heard the whole charge. I believe I was oppoſite to judge Chaſe, and I paid particular attention to the political part of the charge, being under the impreſſion that judge Chaſe was watched.

Q. Was it read?

A. I believe it was; but I frequently caſt my eyes from the judge to Mr. Montgomery, becauſe I thought the charge bore hard on him.

Q. Did judge Chaſe ſay that the preſent adminiſtration was weak and relaxed and not ſeeking the happineſs of the people, but to preſerve themſelves in unfairly acquired power?

A. I have not a ſcintillation of recollection of any thing of that kind, no further than an inference could be drawn from the meaſures which he ſpoke againſt.

Q. Have you any reaſon for ſuppoſing that had ſuch expreſſions been uſed you would have recollected them?

A. I always thought political charges wrong, and if judge Chaſe had reflected on the adminiſtration, when he is a component part of it, I muſt have recollected any expreſſions which he uſed.

—

William M'Mechen ſworn—examined by Mr. Harper.

Q. Was you in court when a charge was delivered by judge Chaſe, at May term, 1803?

A. I was in court, and was in ſuch a ſituation, that I could hear the charge diſtinctly, being not more than five yards from judge Chaſe.

Q. Did the judge appear to read the charge?

A. He did.

Q. Were any expreſſions uſed againſt the preſent adminiſtration?

A. I have not the ſmalleſt recollection of hearing the adminiſtration mentioned.

Q. Had you any converſation with any perſon concerning it?

A. In about five minutes after the charge was delivered, I went down ſtairs, and on my way I met Mr. Montgomery. I aſked him what he thought of the charge—he replied, that "for this and many other offences, Judge Chaſe would be impeached." This cauſed me to pay ſome attention to what had been ſaid. Some time after this I met with a publication in the Anti-Democrat, which was ſaid to be the charge—I examined it with attention, and it did appear to me to be ſubſtantially the same which I had heard.

Q. Did the publication which you ſaw in the Anti-Democrat, contain any thing about the preſent adminiſtration?

A. It did not.

—

William I. Govane ſworn—examined by Mr. Harper.

Q. Was you in the circuit court when the charge was delivered by judge Chaſe in May 1803?

A. I came into court while judge Chaſe was pronouncing theſe words—" before, gentlemen, you retire to your chamber, I will beg leave to make a few obſervations" —I was near the judge, and heard all he ſaid afterwards. I was particularly attentive, and I think he read the whole time.

Q. Had you any converſation concerning the charge?

A few evenings afterwards, I was at the houſe of a friend, who aſked me whether I had heard the charge. I replied that I had, and ſtated to him the prominent features of it. Since I have attended here as a witneſs, and for the firſt time, have ſeen the charge which has been offered in evidence, and I find all the principal parts to be the ſame which I told my friends.

Q. Was any thing ſaid about the preſent adminiſtration?

A. If I could ſwear negatively to any part, after ſo long a time, it would be, that there was nothing of that kind mentioned. I think I muſt have heard thoſe expreſſions had they been uttered; and if I had heard them, I muſt have remembered them, because it was but a ſhort time after, when I gave my friend an account of the charge.

—

John Campbell ſworn—examined by Mr. Harper.

Q. Was you in the circuit court, in May 1803, and in what capacity did you attend?

A. I attended the circuit court held at Baltimore, in May 1803, by Judges Chaſe and Wincheſter. I was ſummoned as a Grand Juror, and was appointed foreman of the jury.

Q. Do you recollect the charge?

A. I recollect ſome part of it.

Q. Did you keep your eyes on the Judge?

A. I did, and he appeared to read the whole time he was delivering it. I have a pretty good recollection of the latter part of it.

Q. Was any thing ſaid againſt the preſent adminiſtration?

A. I have not the ſlighteſt recollection of any thing of that kind.

Q. Do you think you would have remembered ſuch expreſſions had they been uſed?

A. I think I muſt have recollected them.

Q. Was there any recommendation to the Grand Jury?

A. I do not remember.

—

William Cranch ſworn—examined by Mr. Harper.

Q. Was you in the circuit court of Baltimore, when a charge was delivered by Judge Chaſe?

A. I was; and was not more than fifteen feet from Judge Chaſe. He held a book in his hand, and appeared to read the charge from it.

Q. Did he ever appear to leave off reading and ſpeak extempore at any time?

A. He often raiſed his eyes, but I did not obſerve that he repeated more than part of a ſentence without looking at the book.

Q. Did you attend to the charge?

A. I attended particularly to the latter part.

Q. Did you hear any expreſſions about the preſent adminiſtration?

A. I have no recollection of any expreſſions concerning the preſent adminiſtration, further than they might be implicated in his obſervations concerning the repeal of the judiciary ſyſtem.

—

Thomas Hall ſworn and examined on the part of the United States.

Mr. Randolph.—You have been called to give evidence about a charge delivered by judge Chaſe at a circuit court in Baltimore, in May, 1803.

Mr. Hall. I cannot recollect the particular language of judge Chaſe, as I paid but little attention to the charge.

Q. Do you recollect the general ſubſtance?

A. I have my impreſſions concerning it.

Q. Was there any thing ſaid concerning the preſent adminiſtration?

A. I cannot attempt to give the language of judge Chaſe. I live remote from him, and have never converſed with any perſon on the ſubject.

Q. Did he recommend to the jury to prevent the law for aboliſhing the general court?

A. I think he uſed language to that effect.

Q. Did he ſpeak of the manner in which the preſent adminiſtration acquired their power?

A. I do not recollect. I think he ſpoke concerning the preſent adminiſtration, and my impreſſions were, that he intended to convey the idea, that the adminiſtration was weak, or wicked.

Mr. Randolph.

We wiſh to examine Mr. Hay, in explanation of his teſtimony.

George Hay examined by Mr. Randolph.

Q. Did you endeavor to diſſuade the late marſhal of Virginia from the execution of his duty, when in purſuit of Callender?

A. I certainly did not—nor did Mr. Randolph intend to convey that idea. Two reaſons prevented me; the one with regard to my own character, and the other was that I entertained a better opinion of Mr. Randolph's integrity.

Q. You mentioned an opinion to him, that Callender had kept out of the way?

A. I did tell him that I thought he would be unable to take him. I underſtood that Callender had gone to a place where the marſhal would not have acceſs.

Q. Did you mention to him that Callender would ſurrender at the next term?

A. I believe I did.

Q. Was you then retained as counſel for Callender?

A. Not then nor ever.

Q. Was you averſe to appear at that term, and for what reaſon?

A. I was averſe to arguing the cauſe before judge Chaſe. The impreſſions made on my mind from hearing of his conduct in the caſes of Fries and Cooper, were, that it would be extremely unpleaſant for me to appear before him.

Q. What was the political complexion of the jury that tried Callender?

A. I believe that ſeveral of the jury lived out of Richmond—my opinion is, that they were all oppoſed to him in political ſentiments.

Q. What was the political character of colonel John Harvie at that time?

A. I do not know. I recollect that he once made an eloquent ſpeech in favor of ſome reſolutions brought forward by the preſent judge Waſhington, and voted againſt the republicans.

Q. What was the political character of William Rudford at that time?

A. He was called a very moderate man.

Q. What were the politics of Marks Vandeval?

A. He has been uniformly regarded as a republican, but not a decided one.

Q. Did you ever hear of a bill of exceptions being taken in Virginia in a criminal caſe?

A. Never. It would be of no ſervice to take them, becauſe the law does not authoriſe them.

George Hay croſs examined by Mr. Harper.

Q. What point did you ſay you wiſhed to argue in the caſe of Callender?

A. The conſtitutionality of the ſedition law.

Q. Had you any hopes of ſucceſs?

A. I candidly confeſs that I had no hopes of convincing any of the circuit judges, and I had but ſcint hopes of convincing the jury; but I meant to have argued it to the public.

Q. For what purpoſe, to acquit the party?

A. I had but little hopes of doing Callender any good, and I wiſhed to addreſs the public on the conſtitutionality of the law.

Q. Did you not ſtate as a reaſon to the marſhal why you wiſhed Callender not to be tried that term, that he could not be

defended, and if tried at the next term there would be the ſooner chance for a pardon?

A. I have no recollection of it. If Mr. Randolph ſays I did, I know I muſt have ſaid ſo.

Queſtion by Mr. Lee.

Do you recollect of the caſe which came from Winchester of the clerk who was indicted for bribery?

A. I argued the cauſes.

Q. Were there not bills of exception in that caſe?

A. I do not recollect.

David M. Randolph examined by Mr. Harper.

Q. Did not Mr. Hay inform you that the reaſon why he wiſhed Callender not to be taken at that term was, that there would be more chance of his obtaining a pardon if tried at the next term?

A. I do not recollect Mr. Hay's expreſſions, but he gave me to underſtand that Callender could not be defended, and that he would ſurrender at the next term. I did believe that he had the idea of a pardon in h s mind. I did not, when giving teſtimony before, mean to convey the idea that Mr. Hay attempted to diſſuade me from the execution of my duty.

Philip Norborne Nicholas examined by Mr. Lee.

Q. Do you recollect the caſe which came up to the high court of appeals from Winchester, of a clerk for bribery?

A. I do. I proſecuted the caſe, and Mr. Hay was engaged with me.

Q. Were there bills of exception in the record?

A. I believe there were.

Q. Was this caſe decided ſubſequent to the trial of Callender?

A. It was.

Mr. Nicholson ſaid he wiſhed to aſk a queſtion of Mr. Montgomery.

John Montgomery.

Mr. *Montgomery.*—When I before delivered in my teſtimony, I ſaid it would not be in my power to ſtate the language uſed by judge Chaſe in his charge. I find I have been miſunderſtood. I do not pretend to ſay that judge Chaſe made uſe of the word "adminiſtration," nor did he ſay any thing about Mr. Jefferſon's adminiſtration; but he did ſay, that the government (or the adminiſtration) was weak and relaxed, and that their acts did not flow from a wiſh to promote the general welfare, but to keep themſelves in unfairly acquired power.—Theſe were my impreſſions at the time of the charge, and they are ſo now.

Q. At the cloſe of the charge did judge Chaſe give to the jury an expreſs charge to prevent the enaction of the law for the abolition of the general court, or was it an inference?

A. It was in expreſs words, not an inference. I will ſtate further that I never had a converſation with any gentleman who heard the charge, but who coincided in opinion with me as to the latter part. A few days after the charge was publiſhed by judge Chaſe, I had a converſation with his ſon, Mr. Samuel Chaſe, in Mr. Evans's tavern, and I then told him the latter part of the charge had been omitted.

Mr. *Harper* then preſented the following requeſt from judge Chaſe:

Mr. Preſident,

The ſtate of my health will not permit me to remain any longer at this bar. It is with great regret I depart *before* I hear the judgment of this honorable court. If permitted to retire, I ſhall leave this honorable court with an unlimitted confidence in its juſtice; and I beg leave to preſent my thanks to them for their patience and indulgence in the long and tedious examination of the witneſſes. Whatever may be the ultimate deciſion of this honorable court, I conſole myſelf with the reflection, that it will be the reſult of mature deliberation on the *legal* teſtimony in the caſe, and will emanate from thoſe principles, which ought to govern the higheſt tribunal of juſtice in the United States.

The preſident obſerved, that the rules of the court did not require the perſonal

presence of judge Chase, and that there was no objection to his withdrawing.

Mr. *Randolph* said, that on behalf of the managers he must request of the court a postponement of the case until the next day, in order to give time to digest the evidence, and that perhaps some of their witnesses would arrive by that time.

The court then adjourned.

WEDNESDAY, *February* 20, 1805.

The court having met as usual;

Mr. Nicholson observed, that one of the witnesses on behalf of the United States had arrived, and he wished him examined.

Philip Stewart sworn—examined by Mr. Nicholson.

Q. Was you not a member of the grand jury to whom a charge was delivered by judge Chase, in the circuit court at Baltimore in May, 1803?

A. I was, but I have a very imperfect recollection of the charge.

Q. Was there any particular reason why you paid no attention to it?

A. I did not feel well pleased with a part of the charge.

Q. Did he throw any censure on those who had voted for the suffrage law?

A. I felt hurt at some expressions which were used in allusion to it, as I had been a member of the legislature at the time the law passed, and voted for it.

Q. What expressions did he use about the sons of men who had erected the fair fabric?

A. I think he used the word "degeneracy."

Q. Was there a recommendation to the grand jury, to use their influence to prevent the passage of a law for the abolition of the general court?

A. I think there was.

Here the evidence was closed.

WEDNESDAY, February 20.

Mr. Early roſe and ſpoke as follows:

MR. PRESIDENT,

There is nothing more demonſtrative of the efficacy of the principles of our government, than the preſent proſecution. We are now called upon to teſt the correctneſs of thoſe principles. A highly important officer of the government is brought before the bar of this court, charged with having committed acts of the deepeſt dye. An officer who has been intruſted by his country to adminiſter to the people a portion of the juſtice on this ſide of the grave, ſtands charged with diſregarding the ſacred obligations of the conſtitution, and of ſtaining the pure ermin of juſtice, by political party ſpirit. The tranſactions for which the reſpondent is now to anſwer, have paſſed in review before the people, and fixed a foul ſtigma on the American character. To this honorable court, the people through the medium of their repreſentatives, have applied for a vindication of their rights, and dragged the guilty here to receive puniſhment. The firſt article of impeachment exhibited by the houſe of repreſentatives, charges the reſpondent with a conduct that ſtrikes at the root of one of the moſt important priviledges of a free people. I mean the right of trial by jury. This right was one of the moſt valuable priviledges which we acquired by the revolution, and forms one of the ſafeguards in the federal conſtitution. The relative rights of judges and juries in criminal caſes were little known in the dark ages of ſuperſtition, it was reſerved for the ſpirit of modern times, to allow to the jury that ineſtimable right of deciding the law as well as the fact in criminal caſes. This right has been ſo long practiſed, that it would be reaſonable to expect that we ſhould not witneſs any difference of opinion on the ſubject, eſpecially in capital caſes. It is not my intention to deny the right of judges to deliver their opinion on the law to the jury, but it is the moſt delicate power which they poſſeſs, and ought to be exerciſed with caution. By the conſtitution of the United States, the accuſed is to enjoy the right of a trial by an impartial jury. We charge the defendant with having deprived John Fries of the right of having his caſe determined by an impartial jury. For the reſpondent did deliver an extrajudicial opinion, and made certain declarations to influence the minds of the jury againſt the caſe of Fries. This opinion, and theſe declarations would be more regarded by them, as being the acts of a judge who was well informed of the defence of Fries, which depended upon principles of law, and upon thoſe laws which had been denounced by the reſpondent, before any argument was heard, and when he knew that the defence of Fries reſted ſolely on thoſe laws. But ſir, we muſt look a little farther into this tranſaction. It was not enough that Fries ſhould have his chief defence ſnatched from him. It was not enough that a ſolemn opinion was given before counſel were heard, but as if determined to cloſe every avenue of defence, the reſpondent prohibited the counſel from arguing the law to the jury. This fact is eſtabliſhed in ſuch a manner, as to force conviction to the mind of every man. We have the poſitive teſtimony of Mr. Lewis and of Mr. Dallas. On the other ſide, there is the negative teſtimony of Mr. Rawle. This honorable court well know that the teſtimony of one affirmative witneſs ſwearing to a fact, is more regarded in law than the teſtimony of many negative witneſſes, and we muſt forcibly feel the conſonancy of this rule, with common ſenſe. But we will not reſt the caſe here. It appears by the evidence of all the witneſſes, that almoſt every obſervation of the counſel

for Fries, was predicated on the idea that their priviledges were to be reſtricted. Mr. Rawle himſelf ſtated, that all the obſervations of Mr. Lewis were bottomed on that idea, although Mr. Rawle conceived the idea to be a miſtaken one. But the recollection of Mr. Rawle muſt be very imperfect as to the tranſactions of the firſt day. He was buſily employed in performing his official duties and took no notes of the proceedings, nay, ſo imperfect was his recollection, that he did not remember whether Fries was that day in court, or not. But is it not remarkable, that all thoſe obſervations of the counſel which were predicated on the idea, that they were to be deprived of arguing the law to the jury, ſhould have been ſuffered to paſs unnoticed yb the court, if they had not intended that the counſel ſhould be deprived of this right? Thoſe obſervations would not have been ſuffered to paſs unnoticed, had they been unfounded. We have it in teſtimony from Mr. Lewis and Mr. Tilghman, that on the ſecond day the reſpondent told the counſel that they might argue the law to the jury, but it would be at the hazard of their characters. But ſir, in page 12 of the anſwer of the reſpondent, he admits that certain obſervations were made on the firſt day to reſtrict the counſel, and yet none of thoſe obſervations were recollected by Mr. Rawle, which plainly evinces his inattention to the tranſactions of the firſt day. I conſider myſelf then ſafe in the poſition, that the counſel for Fries were reſtricted from arguing the law. The crime with which Fries ſtood charged, was the greateſt poſſible offence, and he ought to have been ſhewn every poſſible indulgence. Not only ſhould every argument which the ingenuity of counſel could have deviſed, have been heard, but the judge ought to have been counſel for the accuſed. It ſhould never be forgotten, that judge Chaſe had a previous example before his eyes, and of a very recent date, ſet by a judge who is now departed from this tranſitory world, to the land of ſpirits. In the firſt trial of Fries, judge Iredell ſet an example, which judge Chaſe ought to have followed; but diſregarding all precedents, and ſetting at naught all examples; the reſpondent firſt determines the law, and then prohibits the counſel from arguing it to the jury. Of what avail is the right of the accuſed to be heard by counſel, when his counſel are prohibited from arguing the law on which his defence entirely reſts? Of what avail is it, that the jury are inveſted with the right of deciding the law as well as the fact, if they are to be prohibited from hearing arguments as to the law. The right of the jury to decide the law in criminal caſes, is as much acknowledged as their right to decide on the facts, and the court have as much power to abridge their rights in one caſe as in the other; and the accuſed has as much right to be heard by counſel on the law as he has on the facts But here we are aſſailed by the reſpondent, in his anſwer, with a train of reaſoning which it may be proper to anſwer in part. He informs the court, that the law with regard to treaſon, had been fixed by his predeceſſors, and he was not at liberty to depart from thoſe principles which had been ſettled by them. It is not our intention to enquire whether the opinions of his predeceſſors were correct, and whether he was bound by them. The enquiry is, whether the reſpondent was juſtifiable in prejudging the caſe, and prohibiting the counſel for the accuſed from arguing the law to the jury. Some part of the reaſoning of the reſpondent, is an aggravation of his offence. He ſays that it is important that the jury ſhould not be miſled by the counſel, and it was a favor confered on them to prevent improper arguments being made to them. This reaſoning will apply to every criminal caſe, whatever. In caſes of murder and theft, the court might

conſider it a favor to prevent counſel from arguing to the jury, leſt improper impreſſions ſhould be made on their minds. Is this the amount of the boaſted trial by jury, that they who poſſeſs the right to decide both law and fact, ſhould be guarded againſt improper impreſſions, and ſhould receive no information on the ſubject they are about to determine? We are told by the reſpondent, that on the ſecond day the counſel were permitted to proceed with the defence in their own way, but they declined. The reſpondent ſuppoſes that much of his defence will reſt on the tranſactions of the ſecond day, conceiving that the opinions which he had promulgated on the firſt day were dangerous; the reſpondent on the ſecond attempted to withdraw them, but there are ſome important features which it is proper to notice, as a preface to the conduct of the judge on the ſecond day. Why were the papers which he had thrown down on the bar table on the firſt day recalled? was it on account of their pernicious tendency, or impropriety, or did the reſpondent feel compunction for having done the act? No ſir, nothing of this kind operated as an inducement to recal the papers. The firm and manly ſtand made by the counſel againſt ſuch an uſurpation, and their determination not to yield to a proſtration of their rights, were the cauſes which induced the recal of the papers, and they were not recalled until the court had convincing proof of the determination of the counſel. But this recalling of the papers was a mere fineſſe played off to give an appearance of fairneſs to the conduct of the reſpondent. Was the crime which was committed by the reſpondent the greater, becauſe the opinion was reduced to writing? It was not. The forming and delivering the opinion, in the preſence of the jury, tending to influence their deciſion, was the guilt of the offence, and the evil was completed by the application of the law to the particular caſe, and the counſel were left to the miſerable hope of convincing the judge that he was wrong. If then I were aſked, as the counſel were, whether if an error had been committed, it ſhould not be ſuffered to be corrected, I would anſwer, that it was an offence that admitted of no atonement. The evil was complete, and repentance came too late. As well might a man who had inflicted a mortal wound, attempt to repent (when he found the perſon dying) under fear of being puniſhed. The ſin committed by the reſpondent was of ſuch a nature, that it admitted of no repentance. As to the permiſſion given to the counſel to proceed, I will obſerve, that I have been unable to perceive any permiſſion which placed them on better grounds than they were on the day before. I think, I obſerve only a deſign in the conduct of the reſpondent to impoſe on the people a ſhew of fairneſs when it had the ſubſtance of injuſtice. Although he informed the counſel that they might argue the law to the jury, yet when brought to explain himſelf, we find he reſtricted the counſel. They were to be permitted to argue the law to the jury, but the manner was to be regulated by the court. They were permitted to read caſes that were law, but not caſes that were not law. This is Mr. Rawle's teſtimony, that common law caſes and deciſions under the ſtatute of Edward the Third, before the revolution in England, ſhould not be read to the jury; for it will be recollected that the caſes mentioned by the judge as improper to be read, were deciſions after the ſtatute of Edward the Third, and were made in the reign of Edward the Fourth. I aſk the court to look at the conſequences of this doctrine. The counſel were permitted to argue the law, but not to read caſes that were not law. Who was to determine whether the caſes were or were not law? The judge himſelf, and the right of the jury, was as much impaired as if the counſel had been

prohibited altogether from arguing the law. It may be ſaid that ſome reſtriction is neceſſary to be laid on counſel. I grant this in ſome extreme caſes, and where it is apparent that the books read, have no relevancy to the jubject, but the greateſt reſtriction on counſel in ſuch caſes, ought to be a regard for their profeſſional reputation. Here I might cloſe the argument on the firſt article; but my reflection is hurried to the latter part of this tranſaction. —We find an American citizen ſummoned to the bar, under a charge which affected his life, and in this ſtate of agitation obliged to make his defence without the aſſiſtance of counſel—and we find the judge who ought to have been his counſel, prejudging the only ground of his defence, and cloſing the avenues of juſtice. On this ſubject, language would be too weak to expreſs my abhorrence of the tranſaction, and I muſt leave it to the ſtronger expreſſions of ſilence. For this tranſaction to denounce the reſpondent, for a violation of our moſt valuable priviledges and invoke the juſtice to expiate the unholy ſin by a puniſhment of the author. The ſecond, third and fourth articles, charge a conduct in the reſpondent, which forms many grounds of accuſation. It is true that in this inſtance, no perſons life was at ſtake, but other privileges were violated which are equally ſacred. In caſting our eyes over this tranſaction, we are ſtruck with a feature not uſual in the hiſtory of judicial proceedings. We find the reſpondent proceeding with a determination to convict. We find him endeavoring to bring ſhame upon the counſel who appeared for Callender. We are met in the outſet of this caſe by the reſpondent, with a long train of reaſoning, but it appears to be the reaſoning of a man conſcious of impropriety. The teſt which was adopted to try whether the jurors were impartial, and the manner in which the judge acted, cannot be accounted for on any other principle, than an intention to convict. Upon what other ground can we account for the jurors being aſked, whether they had formed an opinion upon what they had never ſeen; and although every juror might have an opinion which inſured the conviction of Callender, yet they were obliged to anſwer the queſtion in the negative, which was put to them by the reſpondent. I hope to be pardoned for ſaying what is painful to me, conſidering the years of the reſpondent, that his reaſoning on this ſubject is an *unworthy evaſion*. It is an evaſion which muſt prevent a diſqualification of any juror, and will ſet at nought the conſtitutional proviſion which gives to the accuſed the right of a trial by an impartial jury. But it is alledged, that the opinion formed by Mr. Baſſet was no diſqualification, becauſe it contained no opinion as to the guilt of the traverſer. There is a plain rule on this ſubject which is ſafe and reaſonable. That a juror muſt be indifferent. The reſpondent has in page 20 of his anſwer given his expoſition of indifference in a juror, which I conceive to be erroneous. I am to be anſwered by gentlemen of great legal abilities, and who well know that partiality in a juror will create a diſqualification, and that a juror muſt ſtand indifferent both as to the perſon and the matter in diſpute. Partiality or prejudice need not be in the caſe then for trial, in order to prevent a perſon from ſerving on the jury. It is a rule even in civil caſes, where an opinion is expreſſed on the ſubject, that the party is not a competent juror. By way of illuſtration I will put a caſe of a man who is tried for murder. Suppoſe there is a diſpute as to the fact of killing, whether it amounted to murder or not, and a juror ſpeaking in relation to the killing ſuch, expreſs an opinion that ſuch a killing was murder. I aſk whether ſuch a declaration would not be a diſqualification, certainly it would. The preſent caſe is equally as ſtrong. Although Mr. Baſſet did not declare that

Callender was guilty, yet he did ſay ſo in fact, for he declared that he had formed an "unequivocal opinion," "that the author of *The Proſpect Before Us*, came under the ſedition law." And it was well known that it was for the publication of that book, that Callender was indicted. But the reſpondent ſtates another reaſon why Mr. Baſſet ſhould not have been excuſed, which is, that as it was competent for Callender to have proved the truth of the charges, Baſſet could have formed no opinion on the ſubject. But let it be remembered, that under the ſedition law, there were two grounds of defence, to wit, the facts and the intent, for a writing muſt not only have been falſe, but alſo, ſcandalous and malicious, to conſtitute criminality, and although Baſſet might have formed no opinion as to the truth of the publication, yet he certainly had as to the intent with which it was publiſhed. But it is ſtated, that the opinion of Mr. Baſſet was only founded in repreſentation. The ſame may be ſaid in almoſt every caſe, becauſe few are ſpectators of the commiſſion of an offence, and their opinions muſt be formed on repreſentation. In the caſe of Fries, there were three jurors ſet aſide on the ground of prejudice, yet it is not probable that either of them were ſpectators of the overt acts of treaſon, which Fries ſtood charged with having committed. The reſpondent ſtates, that the opinion of a juror muſt have been delivered as well as formed to diſqualify him from ſerving. Even admit the correctneſs of this poſition, yet it does not excuſe him, for Mr. Baſſet expreſsly ſtated, that he delivered the opinion which he had formed, in open court, previous to his being ſworn in chief. Then why in the teeth of this damning fact, did the judge order Baſſet to be ſworn on the jury. In purſuing this tranſaction, the ſcene ariſes on us. We are next to examine a part of it, in which human invention may be tortured in vain for a palliation, this is the rejection of Colonel Taylor's evidence. The charge in the indictment which he was called to give evidence on, muſt have conſtituted diſtinct offences, but one charge might have conſiſted of ſeveral facts. We have two views of this ſubject, the one to be found in the teſtimony the other in the anſwer. We learn from the teſtimony, that the reſpondent rejected the evidence of colonel Taylor becauſe it did not go to prove the truth of the whole charge. I take it that the charge which colonel Taylor was to prove, was a diſtinct offence, and that his evidence ought not to have been rejected on the ground aſſigned by the reſpondent. In a caſe of murder, the defence may depend on many things. Was it ever heard of before, that a witneſs was rejected becauſe he was unable to prove the whole of the defence? I believe not. Why then was this doctrine applied to the caſe of Callender? Was his juſtification ſuch an anomaly in its nature, that it did not admit of the ordinary rules of juriſprudence? As the charge conſiſted of different facts, ſo the defence ought to have been allowed to be made to each charge. I will now notice the reaſons aſſigned by the reſpondent, in his anſwer for the rejection of colonel Taylor's evidence. In page 24 of the anſwer, we find this doctrine laid down that it firſt muſt be ſhown what is in the power of the party to prove, or the evidence of the firſt witneſs ſhall not be received. Muſt it then appear that the party who produces a witneſs has proof in reſerve? For this is the amount of the reaſoning of the reſpondent. It is new doctrine to me, that the admiſſibility of teſtimony ſhould depend upon what may afterwards be produced. The judge had no right to know what could be proved by other witneſſes. I will farther premiſe, that the queſtion, how far the evidence ſubſtantiated the truth of the charge, and its legality alſo, were queſtions for the jury, becauſe

they were the judges both of the law and the fact, and were to determine whether the traverſer had made good his defence. For ought the judge knew the jury might have been of opinion, that all the reſt of the charges except what colonel Taylor would prove true, did not come under the ſedition law. The fourth article accuſes the reſpondent of partiality. I will beg leave to call the attention of the court to the refuſal to continue the trial until the ſucceeding term. The reaſon aſſigned was, that it did not appear that the witneſſes who were wanting, would prove the truth of all the charges; let us examine this doctrine. The charges againſt Callender, were many. Under the plea of not guilty to the jury, it was competent for him to contend that the charges were true or were not criminal; both of theſe grounds of defence the jury were to paſs upon. With what juſtice could the judge ſay, that becauſe the witneſſes could not prove the truth of the whole of the charges, that there abſence was no good cauſe for a continuance, when the queſtion of law was not to be decided by him. No other concluſion can be given to this conduct of the reſpondent, than an attempt to wreſt from the jury their right to decide on the criminality of the acts. The conſtitution provides that the accuſed ſhall have compulſory proceſs to compel the attendance of his witneſſes, of no avail is this priviledge unleſs time is allowed for the witneſſes to attend. Of what avail is it to ſay, that proceſs ſhall iſſue to compel the attendance of witneſſes, when the party is forced to trial before the proceſs can be returned? This is worſe than mockery, it is high treaſon againſt the majeſty of the conſtitution. Callender was indicted, tried, convicted and puniſhed whilſt his witneſſes were abſent. Shall we be aſked for proofs of corrupt intent in the reſpondent? It is on all hands admitted, that he yields to none in legal learning and abilities, and is poſſeſſed of talents, which might adorn the tribunals of any country. Then I aſk, whether on a queſtion ſo ſimple, he could have erred without intention? I anſwer, no ſir. Can it be ſuppoſed that every thing was done to ſtifle the defence of the accuſed, and yet the judge be free from corrupt intention.—Let gentlemen look at the teſtimony, & they will find damning proofs of an intention in the reſpondent, to oppreſs, and produce the conviction of Callender. The fifth and ſixth articles, are founded on grounds ſo ſimple, that I will not take up the time of the court in diſcuſſing them, but will proceed to the ſeventh. This article charges a conduct in the reſpondent, than which, nothing could tend more to tarniſh his official character. The conſtitution and laws of the United States, have intended that all judges ſhould be impartial diſpenſers of juſtice. In criminal caſes, it was intended that they ſhould ſtand aloof from prejudice, but judge Chaſe in this tranſaction, became a hunter after accuſation. Diſregarding his high judicial ſtation, he becomes the procurer of proſecution. Surely his thirſt for puniſhment muſt have been great, when he could not await the *tardy* movements of the public proſecutor and of the grand jury. If, Mr. Preſident, our judges are to turn informers, and ſeek after proſecution, then muſt this country become the nurſery of oppreſſion. I ſhall not make many obſervations on the eighth article. I conſider it of peculiar importance as it exhibits the general ſpirit of the reſpondent. It places the reſpondent in a grand ſituation. We have heretofore ſeen his power only extended to individuals, but on this occaſion, we behold his gigantic genius raiſing him to a ſurpriſing height, and whole governments ſubject to his wrath. Both the acts of the ſtate of Maryland and of the United States, are expoſed to the whip and the rack. There is no truth more ſacred, than the language of the eighth article, that "without

public harmony there can be no public happineſs." What language can deſcribe the conduct of a judge who attempts to deſtroy the reſpect which the people entertain for the acts of both the ſtate and general governments. It was not ſufficient that a perſon ſitting in the judgment ſeat of the nation, converted it into a forum to pronounce philippics againſt the ſtate in which he ſat as judge; but the congreſs of the United States muſt be held up to view as the ſacrilegious violators of the conſtitution of their country. Mr. Preſident, I have done, and in concluſion, will obſerve, that in my opinion, we have eſtabliſhed againſt the reſpondent, a volume of guilt, every page of which calls aloud for vengeance. I ſhall leave the cauſe of the reſpondent, in hands where there will be a different meaſure of juſtice than he is wont to mete to others, and where it will be adminiſtered without reſpect to perſons.

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Mr. CAMPBELL,

Mr. Preſident, and Gentlemen of the Senate,

It is with peculiar diffidence that I riſe on this important occaſion. Senſible of my inability to do juſtice to the cauſe, were I left to conſult my own inclination, I ſhould decline the undertaking. But being called upon by the houſe of repreſentatives, to aid in the proſecution, I muſt obey the voice of my country, and perform my duty. Under theſe impreſſions I ſhall proceed to inveſtigate the queſtion as well as the ſhort time which I have been able to devote to it, owing to my other avocations and the narrow means of information in this place on the ſubject of impeachment will permit me. I feel however fully confident, that I am aſſociated with gentlemen fully competent to ſupply my deficiencies; and that the members of the ſenate are adequate to the inveſtigation of the ſubject, and that there is no probability that juſtice will not take place.—The ſcene before us is more than uſually intereſting and important. One of the higheſt officers of the country is called upon to anſwer before the very tribunal that ſanctioned his elevation. It is a truth which has been eſtabliſhed by the experience of ages, that high offices generally corrupt thoſe to whom they are entruſted, and few have been found able to reſiſt the impulſe of graſping at ſtill greater powers than they poſſeſs. Hence it has been the exertion of all governments who regard the liberties of the people, to guard againſt the abuſe of power, by calling on thoſe to whom it is entruſted, to give an account of the manner in which they have executed their truſt. For this purpoſe the trial by impeachment was early reſorted to in England. More than five hundred years ago, the repreſentatives of the people in that nation, called upon the higheſt officers to account for their conduct, and to be puniſhed for a violation of the law. The trial by impeachment is a peculiar favor to the accuſed, becauſe the higheſt tribunal in the nation cannot be influenced, and party ſpirit will always be laid aſide. In the view which I ſhall take of this ſubject, it will be proper firſt to notice the proviſions relative to impeachment, and to ſhew how far they apply to the preſent accuſation. In the conſtitution of the United States it is ſaid, "that the ſenate ſhall have the ſole power of trying all impeachments." Here let me obſerve, that the wiſdom of the framers of the conſtitution is plainly diſcovered in this ſection. The higheſt and moſt enlightened tribunal in the nation, is charged with the protection of the people, and to proteſt againſt thoſe whom they themſelves had elevated to power, and of whom they had once entertained ſo favorable an opinion. —No inferior tribunal is allowed to

try an officer of the government, and judges are placed out of the reach of ſuſpicion. But the "judgment in caſes of impeachment cannot extend farther than a removal from office, and a diſqualification to hold an office of honor, truſt or profit, under the United States." Here the conſtitution makes an evident diſtinction between ſuch crimes as are puniſhable by impeachment, and thoſe puniſhable by indictment. So far as the offence of the officer is injurious to ſociety, and calculated to endanger the lives and liberties of the people, ſo far is he impeachable before this tribunal, and not elſewhere. But where an indictment will lie for the offence, there an impeachment will not. An impeachment is a kind of inqueſt, to examine in what manner the officers have diſcharged their duty. It is not therefore neceſſary that the offence ſhould be an indictable one, to render it a ſubject of impeachment, but that the officer has abuſed the truſt repoſed in him and endangered the liberties of the people. The mode of proceeding in the caſes of impeachment and indictment clearly ſhews the diſtinction between them. In the former no proceſs iſſued to take the party into cuſtody, but merely a ſummons for him to appear at the bar of this court, to anſwer the charges. This plainly evinces, that it is not conſidered a criminal accuſation. In caſes in courts of ordinary juriſdiction, the perſonal attendance of the party accuſed is neceſſary, but in this caſe it is not. Either there muſt be a diſtinction between the offences, or this monſtrous abſurdity is involved; that a man may be puniſhed twice for the ſame offence, firſt by impeachment and then by indictment. It muſt I think appear evident to every gentleman who hears me, that the diſtinction does exiſt between impeachable and indictable offences; and that when the conſtitution declares that the officer may be proceeded againſt by indictment, it muſt mean in offences not impeachable. And that an impeachment lies for an abuſe of the power entruſted to an officer, and done in his official capacity, and puniſhable by this tribunal; and an indictment lies for ſomething not done in his official capacity, and to be tried in a court of ordinary juriſdiction. With this view of the ſubject I will proceed to examine the articles of impeachment and the evidence. It will not be expected that I ſhall enter into a minute detail of the volume of evidence which has been adduced in this caſe, I ſhall only conſider the facts which have been proved, and from theſe I will attempt to eſtabliſh that on the whole conduct of judge Chaſe, he was actuated by motives of oppreſſion, and a diſpoſition to bear down all oppoſition to his principles. There is not a ſingle article not ſtrongly marked with oppreſſion, and ſpringing from political intolerence. In order to obſerve ſome arrangement in my argument. I ſhall conſider firſt the conduct of the judge at the trial of Fries. I ſhall alſo conſider his conduct at the trial of Callender for a libel, ſo far as it is embraced in the ſecond, third and fourth articles. The fifth and ſixth articles I ſhall leave to thoſe of my colleagues who are better acquainted with the ſubject than I am. The two laſt articles ſhall be relied upon by me to ſhow the motives of the judge. In examining the firſt article I ſhall rely on the following poſitions. I ſhall firſt endeavor to ſhew that Fries was entitled to the benefit of his counſels being heard on the law as well as the fact, without being ſubject to the reſtrictions impoſed on them by the judge. I ſhall ſecondly contend, that the judge by delivering his opinion, did virtually prevent the counſel from arguing the caſe. And that he did impoſe reſtrictions unknown before, and then I ſhall inſiſt that thoſe actions could only ſpring from corrupt motives, and a diſpoſition in judge Chaſe

to oppreſs all thoſe who came before him for trial who differed in political opinions with him.

My firſt poſition is ſupported by the eighth article amendatory of the conſtitution, which provides "that the accuſed ſhall have the benefit of counſel for his defence." Of what benefit will counſel be when an opinion is delivered before they are heard. Of what benefit can counſel be when they are to be ſubject to the arbitrary rules of the court? According to the doctrine of the reſpondent, the right of the accuſed to have counſel would be a mere nothing. If a man has the benefit, he has alſo the means of uſing it. Although it is ſaid, in the anſwer filed by the reſpondent, that in ſome reſpects the counſel are the mere officers of the court, yet counſel are protected in the exerciſe of their rights as completely as the judge; and not ſubject to the arbitrary reſtrictions of the court. I will now proceed to the ſecond poſition which I laid down, which is, that the judge by delivering an opinion, did virtually prevent the counſel from arguing the caſe. The fact of the judges having delivered an opinion, is admitted in his anſwer, pages 11 and 13. It is alſo proved by teſtimony that will not admit of a doubt, and it only remains, to enquire into the reaſons of the judge, for departing from the univerſal practice. It was a direct violation of the conſtitutional right which the priſoner had ſecured to him. But it is inſiſted on by the judge, that the caſe had before been decided and the point of law ſettled, and it is aſked, "whether any evil could reſult from the delivery of the opinion at any ſtage of the trial." We do not charge that the opinion was erroneous, but that the judge decided without hearing counſel, and prevented the counſel from being heard, thereby depriving the priſoner of his conſtitutional right. If this conduct was correct, what would be the conſequences? The judge might paſs final ſentence without a jury trial. This is the ſum of the excuſe made by the reſpondent, that the opinion was correct, and that he muſt finally have delivered it, and therefore there was no neceſſity to hear counſel. Dangerous, ſir, would be this doctrine. If true, the boaſted trial by jury is a mere phantom, toſſed about by the breath of every judge, and would be unable to anſwer any good purpoſe whatever. I will now ſtate, that the conduct of the judge was contrary to the rules and uſages of courts. For the truth of this aſſertion, I may refer to the whole teſtimony adduced in this cauſe. Not a ſolitary inſtance has occured, where all the witneſſes practiſed law, of a judge delivering an opinion before argument. By this act, the judge has broken the eſtabliſhed practice of courts, and it is incumbent on him to ſhew that it was proper. I will here notice an admiſſion of the judge, which ſaves me the neceſſity of proving what he admits. In the eleventh page of his anſwer, he ſtates that the jury had the right in the caſe of Fries, to decide on the law; but he alſo ſtates, that the court had a right to give an opinion on the law. If this is true, the judge had an equal right to give an opinion on the facts; becauſe the jury had the ſame power to decide the law as well as the fact. Once eſtabliſh this doctrine, and the trial by jury is not worth preſervation. I will now proceed to the third poſition, which is "that the judge did impoſe arbitrary reſtrictions on the counſel for Fries." This poſition is clearly eſtabliſhed by the teſtimony of Mr. Lewis and Mr. Dallas. Mr. Lewis, declared in his evidence, that judge Chaſe ſaid, "that in a former trial, great waſte of time had taken place in reading common law authorities and deciſions under the ſtatutes of England, before their revolution, and alſo the ſtatutes of the United States, and that it ſhould not take place again." Let me bring to the recollection of the court, the delivering of the

opinion. The ſcene was novel to all the bar—the whole audience witneſſed a new ſcene. The teſtimony further ſtates, that the judge told the counſel that they muſt addreſs themſelves on the law, to the court, and not to the jury. On this point, I conſider the evidence of the counſel concluſive. For although the witneſſes brought forward on the part of the reſpondent do not recollect this, yet their want of recollection does not invalidate the teſtimony of creditable witneſſes. I muſt make a diſtinction between the credibility of witneſſes; and the credit which ought to be attached to them on account of their relative ſituation. The teſtimony given by the counſel for Fries, is entitled to more weight than the teſtimony of the other witneſſes; becauſe being, intereſted in the caſe, they were more likely to obſerve what paſſed. On this ground, Mr. Lewis's evidence is unſhaken. He felt much intereſted, and the tranſaction made a deep impreſſion on his mind. Taking then his evidence as a fact not diſputed, I aſk whether the reſtrictions were not unknown to the laws and inconſiſtent with the practice of the courts. All the witneſſes declare this. Theſe reſtrictions were an entire prohibition of the counſel to ſpeak. What were they to ſpeak upon? The facts were admitted on all hands; a former trial had taken place and the facts were eſtabliſhed. The judge aſſigned counſel to the accuſed, for what purpoſe I cannot deviſe. What were they to argue? Were they to argue to the judge, that he was in an error? This was a mockery of juſtice.——The judge could not preſume, that the counſel would argue the caſe. The aſſignment of counſel muſt have been a compliance with form and not for the purpoſes of juſtice. I ſhall now notice an exertion made by the reſpondent, to give a coloring to the object which the counſel for Fries, had in view, and which he muſt have known they had in view in reading deciſions in England, on the law of treaſon before the revolution. The judge ſtates that he preſumes that common law authorities, could not throw any light on the law of treaſon. But Mr. Lewis ſtates, that the object they had in view was not to ſhew that the courts of the United States were bound by thoſe deciſions, but to ſhew that the courts in England had ſince the revolution conſidered themſelves bound by the deciſions before the revolution, and that as the attorney for the United States was ſuffered to read the diciſions of the courts ſince the revolution, they wiſhed to ſhew to what an extent conſtructive treaſon had been carried before the revolution, and that thoſe deciſions had influence on the judges who made deciſions after the revolution, and that therefore none of the deciſions in England with regard to treaſon, were binding on the courts of the United States. This was an object of importance; but the counſel were deprived of this right, and they were alſo told that they muſt not cite the ſtatutes of the United States, although ſome of the witneſſes have denied this, yet Mr. Lewis, ſtates poſitively, that this was done. Is it then conſidered to be the uſages of our courts, that the ſtatutes of congreſs are not to be read in the courts, in order to ſhow that what was charged to be treaſon, was only ſedition. This was a direct violation of the right of the priſoner and of the counſel. It then remains to ſhew that the conduct of the judge could not ſpring from any but corrupt motives and an intention to oppreſs Fries. In ſupport of this poſition, I beg leave to lay down as a rule, that when a man violates the laws of his country, improper motives muſt be preſumed, and it reſts on him to ſhew the purity of motives either by evidence or by circumſtances. The judge ſays, that if he were miſtaken in the law, he could not be conſidered as liable to puniſhment. Sir, ignorance of the law cannot be offered as a juſtification. The known talents of the

reſpondent precludes the idea that he acted from ignorance. In the caſe of Fries, he had no precedent by which he could have acted. No inſtance has been offered of a ſimilar conduct. He relies upon the proceedings and opinion of the circuit court previous to the ſecond trial of Fries. I aſk why the reſpondent did not follow the practice of the judges who ſat in thoſe trials to which he alludes? They certainly condemn him. The counſel all ſtate, that at thoſe trials they were permitted to cite all the authorities which they wiſhed, and to argue the law to the jury as fully as they thought proper. No opinion was delivered before the counſel were heard. Why then did not judge Chaſe conform to the practice in thoſe deciſions, on which he relies for a juſtification? I leave it to his counſel to reconcile this. I might in this caſe inſiſt that the judge having ſuch high opinions before his eyes, he muſt have been confident that he was violating the laws of his country, when he acted in oppoſition to thoſe opinions. Let me merely obſerve, that the judge muſt have had in view the conviction of Fries. The counſel were aſſigned merely for the ſake of form. The day of trial was appointed. In the mean time, the judge makes up his opinion: the priſoner is called to the bar, not for trial, but to receive ſentence; and the poor, friendleſs Fries, is without a trial, conſigned to the hands of the unrelenting executioner. Is this an impartial adminiſtration of juſtice? No ſir, it is not, and I may ſafely charge the judge with having wilfully violated the laws, and that it was done on account of his differing in political ſentiments with Fries, and I call on this court to vindicate the rights of the people, and puniſh the violater of the laws. But it is inſiſted that the judge on the next day withdrew the opinion which he gave on the firſt day, and gave full liberty to the counſel to proceed with the defence. This permiſſion came too late; the act was completed, the opinion had been delivered, and the impreſſions made on the minds of the jury; and the withdrawing of the opinion anſwered no good purpoſe. As well might the judge ſay after having ſcattered fire brands over the country, that he ought to be forgiven, becauſe he had withdrawn the inſtrument that firſt cauſed the conflagration.

On this part of the ſubject, the counſel felt as I feel, that after a ſolemn opinion had been delivered, in the hearing of the jury, that the offer made by the judge was a mere *fineſſe* to give an appearance of fairneſs in the tranſaction, when no good could reſult from the offer to Fries. The counſel thought it their duty to abandon the defence, becauſe the ground on which it reſted was ſnatched from under them by the court. And here let me notice, that when Mr. Lewis ſtated that he conceived that their withdrawing from the defence of Fries would be an advantage to him, his grounds for ſo thinking were, that they could be of no ſervice in defending him after the conduct of the court, and that they had better reſt on the application for mercy.

I will now notice a ground taken by the judge in his anſwer, page 17, which is, that he cannot be impeached unleſs the offence be an indictable one. I will refer to the expoſition which I attempted to give before in order to ſhew that this is not correct, and in order to ſhew that they are ſeperate and diſtinct offences. I will alſo refer to known and eſtabliſhed authorities in England. In 2nd Bacon's abridgement, and Jacob's Law Dictionary, it will be found that the defence of the judge is not tenable. I have now finiſhed my obſervation on the firſt article, and feeling much indiſpoſed, I ſhall ſit down, in order to ſee whether the court will adjourn either for a ſhort time, or until to-morrow.

The court adjourned for half an hour.

The court having again met, Mr. Early obſerved that Mr. Campbell was ſo much indiſpoſed, as to render it impoſſible for him to proceed, and ſolicited until the next day to conclude his obſervations—after ſome converſation, the court adjourned.

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THURSDAY, February 21.

The court being called as uſual.

Mr. Campbell, in continuation,

Mr. Preſident, and Gentlemen of the Senate.

I will now proceed to examine the ſecond part of the accuſation, which relates to the conduct of the judge at the trial of Callender. I ſhall examine the articles in the order in which they took place, but in order to find out the motives of the judge, let us advert to his converſations previous to the trial. The intended proſecution was firſt talked of at Annapolis. There the judge is found with the book in his poſſeſſion, and declaring that he would puniſh Callender if there was an honeſt jury in the ſtate of Virginia. This is proved by the teſtimony of John Thompſon Maſon, is uncontradicted and will not admit of a doubt. In the ſtage on his way to Richmond, we find the judge denouncing the defendant. After the indictment was found, the pannel of the jury is preſented to him; he enquires whether there are any creatures called democrats on it, and orders them to be ſtruck off. This is proved by the teſtimony of John Heath. His character is better known by ſome of the members of this court than it is by me. If his integrity is good he cannot be miſtaken. It is true, the marſhal has ſtated that he does not recollect it; but it may have eſcaped his memory. The fact muſt have exiſted unleſs Mr. Heath told a wilful falſehood, and it ſhewed a determination in the judge to puniſh Callender.

I will now examine the grounds of the refuſal to continue the caſe upon the affidavit.

When the defendant was called to the bar, to anſwer, he wiſhed to have his caſe continued, and for that purpoſe filed an affidavit, ſtating the abſence of material witneſſes. I ſhall contend that this affidavit was ſufficient to continue the cauſe. The defendant ſwore that witneſſes who were abſent, were material to his defence.

On this ſubject I will take the liberty of citing a ſhort caſe on the ſubject of continuance. It is from Foſter's Crown Law, page 2, where a ſpecial commiſſion had iſſued to the court to try perſons charged with the crime of high treaſon, and upon an affidavit made that there were abſent witneſſes who were material, the court granted ſufficient time for their appearance. (Here Mr. Campbell read the caſe) From this caſe it will appear, that in England an affidavit ſimilar to the one filed in the caſe of Callender is deemed ſufficient to continue the cauſe. But the affidavit of Callender was ſtronger than the one reported in Foſter. Judge Chaſe muſt therefore have acted contrary to the laws and known uſages of our country. But the judge in his anſwer, as if to aggravate the caſe, has introduced a train of ſophiſtical reaſoning in order to ſhew that the affidavit was not ſufficient, inaſmuch as it did not ſtate that the witneſſes could prove the truth of all the charges, and that therefore Callender muſt have been convicted. Can any principle of law juſtify the poſition, that the defendant, before he can entitle himſelf to a continuance, muſt prove to the

judge, what he expected to prove to the jury? I hold that in ordinary cases, it is sufficient to shew that the witnesses are material and that their attendance can be procured. In the case of Callender the affidavit did substantially state, that the attendance of the witnesses could be procured at the next term. It stated their place of residence, and that they could not be procured at that term, and it follows that he must have expected that they could attend at the next term. If the doctrine contended for by the judge is correct, the practice of continuing cases will be discretionary with the court, and instead of producing any salutary effect, it will be productive of nothing but injustice and oppression. Not once in ten thousand times would a defendant be able to have his case continued. The doctrine is dangerous to the liberties of the people. The refusal to continue the case, is to my mind, an evidence of the spirit by which the judge was actuated during the whole trial, which was to convict Callender; and he was determined to bear down all opposition to this favorite object.

I shall now proceed to notice the second article of impeachment, which relates to the conduct of the judge in overruling the objection of Mr. Baffet the juror.

In examining this article, I shall endeavor to shew that Baffet was an illegal juror on two grounds: first because he had made up an opinion and was not indifferent, and secondly, that according to the question propounded by the judge himself, Mr. Baffet ought not to have been sworn on the jury. The evidence of Mr. Baffet was that he had seen extracts which were said to be taken from the "*Prospect before Us*," and had formed an unequivocal opinion that they came under the sedition law. Baffet clearly knew that the indictment against Callender was founded on the book called the "*Prospect before Us*," and he therefore had formed an opinion against Callender, and did not stand indifferent. But even admitting that the opinion must be delivered as well as formed, still Mr. Bassett was disqualified from serving, for he did deliver the opinion which he had formed, in the presence of the court, and was clearly as much a forming and delivering an opinion, as if they they had been done at the same time. I see no difference between the cases. The reason assigned by the judge for overruling the objection of Mr. Baffet was, that he had not formed and delivered an opinion upon the charges in the indictment. Once establish this doctrine, and (as the respondent did) refuse to suffer the indictment to be read to the jurors, and no juror can be disqualified. In third Bacon's abridgement, page 756, it is expressly said, 'That if a juror has declared any opinion, or done any thing to make him not indifferent to the parties, it is a principle cause of challenge.' In the case of Callender, the juror had made up his mind, and had delivered his opinion, and yet was sworn on the jury. If jurors are to be allowed to serve after such acts as these, the boasted trial by jury, instead of being a shield for innocence, will become an instrument of oppression.

I have I think, clearly established the position, that Mr. Baffet was an incompetent juror; what excuse then can be offered for his objections being overruled? The judge says, that all men had made up their opinions against such notorious offenders as Callender, and that had not the objections of Mr. Baffet been overruled, that it would have been impossible to have obtained a jury. But, sir, there is a better reason, which can be offered for the conduct of the respondent. He had determined that Callender should be convicted, and knowing the character and poli-

ties of Mr. Baſſet, he did not wiſh that he ſhould be excuſed, and therefore overruled his objections.

The next article, relates to the rejection of colonel Taylor's teſtimony. I muſt here revert to the ſituation in which Callender was placed by the judge. He was forced to trial while his material witneſſes were abſent. He called upon a perſon to give evidence in his favour; his counſel were made to reduce their queſtions to writing; and the judge was to determine whether the evidence went to prove the truth of the whole charge. Here were the ſtrongeſt marks of oppreſſion, and to complete all, the judge determined that the evidence ſhould not go to the jury. This was a practice unknown to our courts; a judge had never before undertook to determine the extent of the teſtimony. I ſhall take this diſtinction, I admit that a court can control improper queſtions, but they have no right to decide whether it will prove the whole of the charge or not, for this is the province of the jury to determine. Of this right, judge Chaſe deprived the jury in the caſe of Callender. If this conduct is correct, the trial by jury is a phantom, and we may well recommend to the government to ſtrike off this incumbrance. But it is ſaid that judge Griffin concurred in this deciſion. Sir, this is no excuſe for judge Chaſe; ſurely he cannot reſt his defence on ſo weak a ground as the one, that becauſe judge Griffin concurred, that he muſt be innocent. There is no ſtatute of limitation to impeachments, and who can ſay but that we may hereafter call judge Griffin to an account; but more than probable he was under the influence of judge Chaſe. But the act of compelling the counſel to reduce their queſtions to writing, was the act of judge Chaſe alone. There are ſome caſes where queſtions may be ordered to be reduced to writing, as where a queſtion ariſes on the queſtion itſelf; but to compel counſel to reduce their queſtions to writing in order to determine their extent, was novel to every perſon, and was a part of that perſecuting ſpirit which was manifeſted during the whole courſe of the trial. How could the judge have hit upon ſo many errors, had there not been a predetermination to convict the defendant? It is impoſſible that the errors could have been other than intentional. I need not dwell longer on this part of the charge.

On the fourth article I will obſerve, that it appeared to be the intention of the judge, to prevent the counſel from exerting themſelves in Callender's favour.

Before he left Anappolis, he declared that he would teach the bar of Virginia, the difference between the liberty and the licentiouſneſs of the preſs. In Richmond, we find the judge carrying this threat into effect. He treated the counſel for Callender, as muſhrooms of the day, and in deriſion, called them "boys;" in the whole of his conduct towards them he was witty and ſatyrical. Sir, the rights and liberties of the citizen are too ſerious to be a ſubject of jeſt. The conduct of the judge was intended to turn the counſel into ridicule, but the injury reſulted to the defendant, for the counſel having their character at ſtake, withdrew from his defence, and he was condemned without their aſſiſtance.

I will briefly notice the conduct of the judge, as charged in the ſeventh article. It appears to be ſtrongly marked with that political intolerance, that the whole courſe of this proceeding ſeemed to evince. He deſcended from the dignity of his office, in order to procure the puniſhment of a perſon of different political ſentiments from himſelf. The eighth article is concerning a ſimilar conduct. He there is charged, and the charge is ſubſtantiat-

ed, with attempting to alarm the public mind and deſtroy the confidence of the people in the government. Inſtead of a perſon of different political ſentiments having juſtice done him by judge Chaſe, he is merely brought before him for the purpoſe of conviction. Is this a character fit to occupy a ſeat on the bench ? No, he is not. The ſtreams of juſtice ought to flow as clear as the ſunbeams of the morning. A man ought to come before the court with confidence that he will have juſtice. And the accuſed will then hear his ſentence with indifference. The deciſion of this caſe will be important, and I have no doubt that it will be decided with impartiality to the people and the judge.

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Mr. CLARKE roſe and ſaid,

Mr. Preſident,

I will make a few remarks upon the fifth and ſixth articles, in order that the caſe may be fully opened. In a very few words I hope I ſhall be able to place the law on the ſubject, in that point of view in which it will be able to ſtand. The practice under the law of Virginia, has been attempted to be proved by the memory of counſel. That is too erring a ſtandard for us to be regulated by. The proceſs is generally directed by the court and the clerk, and this accounts for the ſeeming difference in the practice. It is admitted that the proceſs iſſued againſt Callender was juſtifiable by the practice of other ſtates, but the federal courts ſitting in Virginia, are expreſsly bound by the laws of that ſtate, which directs that in all caſes not capital, " a ſummons or other proper proceſs ſhall iſſue." If we attend to the duty of the grand jury, we ſhall find a clear expoſition of the words other " proper proceſs." The grand jury are by the laws of Virginia, to preſent perſons for " murder, felony, or other miſdemeanors." In my opinion this plainly ſhews, that the words " other proper proceſs," apply to proceſs ſimilar to a ſummons. It has been ſaid that the counſel for Callender, did not ſuggeſt this law of Virginia. Mr. Preſident, the counſel were not employed when the proceſs iſſued, and had nothing to do with it. But whether a capias or a ſummons is iſſued, the law expreſsly orders, that it ſhall be returnable to the next term. This alſo is the practice in the courts in England, as will be found by a reference to Hawkins. If it were not the buſineſs of the judge to have known the laws of Virginia, he was bound to know the laws of England. Even had he looked there, he would have ſeen that a *venire facias*, which is in the nature of a ſummons, is the proper proceſs, and that it is returnable to the next court. But the judge has ſtated, that ignorance of the law is excuſeable in him. Had he not have been acquainted with the law in this particular, he ought not to have proceeded with ſo much precipitancy. On Saturday morning the preſentment was found, and the proceſs was iſſued immediately, without even waiting for an indictment. This can only be accounted for by the ſuſpicion, that the judge had gone to Richmond, with a determination to convict Callender, and had acted with degradation to his high official ſtation, and iſſued proceſs contrary to law. Having thus ſtated the law on the fifth and ſixth articles, I have only to obſerve, that the opening of the proſecution is fully cloſed.

FRIDAY, February 22.

MR. HOPKINSON'S SPEECH.

MR. PRESIDENT,

We cannot remind you and this honorable court, as our opponents have so frequently done, that we addreſs you in behalf of the majeſty of the people—we appear for an ancient and infirm man, whoſe better days have been worn out in the ſervice of that country which now degrades him, and who has nothing to promiſe you for an honorable acquittal, but the approbation of your own conſciences; we are happy however to concur with the honorable managers in one point; I mean, the importance they are diſpoſed to give to this cauſe. In every relation and aſpect in which it can be viewed, it is indeed of infinite importance. It is important to the reſpondent, to the full amount of his good name and reputation, and of that little portion of happineſs the ſmall reſidue of his life may afford. It is important to you, ſenators and judges, inaſmuch as you value the judgment which poſterity ſhall paſs upon the proceedings of this day; it is important to our country as ſhe eſtimates her character, for ſound, dignified and impartial juſtice, in the eyes of a judging world. The little, buſy vortex, that plays immediately round the ſcene of action, conſiders this proceeding merely as the trial of judge Chaſe, and gaze upon him as the only perſon intereſted in the reſult. This is a falſe and imperfect view of the caſe—It is not the trial of judge Chaſe alone—it is a trial between him and his country; and that country is as dearly intereſted as the judge can be, in a fair and impartial inveſtigation of the caſe, and in a juſt and honeſt deciſion of it. There is yet another dread tribunal to which we ſhould not be inattentive—we ſhould look to it with ſolemn impreſſions of reſpect—it is POSTERITY—the race of men that will come after us—when all the falſe glare and falſe importance of the times ſhall paſs away—when things ſhall ſettle down into a ſtate of placid tranquility, and loſe that buſtling motion which deceives with falſe appearances—when you, moſt honorable ſenators, who ſit here to judge, as well as the reſpondent who ſets to be judged, ſhall alike reſt in the ſilence of the tomb, then comes the faithful, the ſcrutinizing hiſtorian, who without fear or favour will record the tranſaction; then comes a juſt and impartial poſterity, who without regard to perſons or to dignities, will decide upon your deciſion—then, I truſt, the high honor and integrity of this court, will ſtand recorded in the pure language of deſerved praiſe, and this day will be remembered in the annals of our land, as honorable to the reſpondent, to his judges, and to the juſtice of our country.

We have heard, ſir, from the honorable managers who have addreſſed you, many harſh expreſſions—I hope, ſir, they will do no harm; we have been told of the reſpondent's "unholy ſins," which, even the heavenly expiation of ſincere repentance cannot waſh away; we have been told of his volumes of guilt, every page of which calls loudly for puniſhment. This ſort of language but purſues the ſame ſpirit of aſperity and reproach which was begun in the replication to our anſwer.—But we come here, ſir, not to complain of any thing, we come expecting to bear and to forbear much. It does indeed ſeem to me, that the replication filed by the honorable manager on behalf of the houſe of repreſentatives and all the people, carries with it more acrimony than either the occaſion or their dignity demanded. It may be ſaid they have reſorted for it to Engliſh precedent, and framed it from the replication filed in the celebrated caſe of Warren Haſtings. There is however, no ſimilarity between that caſe and ours—

Precedents might have been found more mild in their character, and more adapted to the circumſtances of our caſe. The impeachment of Haſtings was not inſtituted on a petty catalogue of frivolous occurrences, more calculated to excite ridicule than apprehenſion, but for the alledged murder of princes and plunder of empires. If, however, the choice of this caſe, as a precedent for our pleadings, has expoſed us to ſome unpleaſant expreſſions, it alſo furniſhes to us abundance of conſolation and hope.—There the moſt ſplendid talents that ever adorned the Britiſh nation were ſtrained to their utmoſt exertion to cruſh the devoted victim of malignant perſecution —But in vain—The ſtern integrity, the enlightened perception, the immovable juſtice of his judges ſtood as a barrier between him and deſtruction, and ſafely protected him from the fury of the ſtorm. So, I truſt in God, it will be with us.

In England the impeachment of a judge is a rare occurrence; I recollect but two in half a century—But in our country, boaſting of its ſuperior purity and virtue, and declaiming ever againſt the vices, venality and corruption of the old world, ſeven judges have been proſecuted, criminally, in about two years—a melancholy proof, either of extreme and unequalled corruption in our judiciary, or of ſtrange and perſecuting times among us.

The firſt proper object of our enquiry in this caſe, is to aſcertain with proper preciſion what acts or offences of a public officer are the legal objects of impeachment. This queſtion meets us at the very threſhold of the caſe. If it ſhall appear that the charges exhibited in theſe articles of impeachment are not, even if true, the conſtitutional ſubjects of impeachment, if it ſhall turn out, on the inveſtigation, that the judge has really fallen into error, miſtake or indiſcretion, yet if he ſtands acquitted in proof of any ſuch acts as by the law of the land are impeachable offences, he ſtands entitled to his diſcharge or his trial. This proceeding by impeachment is a mode of trial created and defined by the conſtitution of our country; and by this the court is concluſively bound. To the conſtitution then we muſt excluſively look to diſcover, what is, or is not impeachable. We ſhall there find the whole proceeding diſtinctly marked out; and every thing, deſignated and properly diſtributed, neceſſary in the conſtruction of a court of criminal juriſdiction—We ſhall find—1. Who ſhall originate or preſent an impeachment—2. Who ſhall try it—3. For what offences it may be uſed—4. What is the puniſhment on conviction.—The firſt of theſe points is provided for in the 2d ſection of the 1ſt. article of the conſtitution, where it is declared, that "the houſe of repreſentatives ſhall have the ſole power of impeachment."—This power correſponds with that of a grand jury to find a preſentment or indictment.—In the third ſection of the ſame article, the court is provided, before whom the impeachment thus originated ſhall be tried—"The ſenate ſhall have the ſole power to try all impeachments." And the fourth ſection of the ſecond article points out and deſcribes the offences intended to be impeachable, and the puniſhment which is to follow conviction; ſubject to a limitation in the 3d. ſection of the 1ſt article.

Have any facts then been given in evidence againſt the reſpondent which makes him liable to be proceeded againſt by this high proceſs of impeachment? What are the offences? What is the conſtitutional deſcription of thoſe official acts for which a public officer may be arraigned before this high court. In the 4th. ſect. of the 2d. art. of the conſtitution, it is declared, that "the preſident, vice preſident, and all civil officers of the United States, ſhall be removed from of-

fice on impeachment for, and conviction of treaſon, bribery or other high crimes and miſdemeanors." Treaſon or bribery is not alledged againſt us on this occaſion; our offences muſt not come under the general deſcription of "high crimes and miſdemeanors," or we are not impeachable by the conſtitution of the United States. I offer it as a poſition, I ſhall rely upon in my argument, that no judge can be impeached and removed from office for any act or offence for which he could not be indicted. It muſt be by law an indictable offence. One of the gentlemen indeed who conducts this proſecution (Mr. Campbell,) contends for the reverſe of this propoſition, and holds that for ſuch official acts as are the ſubject of impeachment no indictment will lie or can be maintained—For, ſays he, it would involve us in this monſtrous oppreſſion and abſurdity, that a man might be twice puniſhed for the ſame offence; once by impeachment, and then by indictment—and ſo moſt ſurely he may; and the limitation of the puniſhment on impeachment takes away the injuſtice and oppreſſion the gentleman dreads: a ſlight attention to the ſubject will ſhew the fallacy of this gentleman's doctrine. If the abſurdity and oppreſſion he fears will really enſue, on indicting a man for the ſame offence for which he has been already impeached, they muſt be charged to the conſtitution itſelf; which in the 3d. ſection of the 1ſt. article, after limiting the extent of the judgment, in caſes of impeachment, goes on to declare, that "the party convicted ſhall nevertheleſs be liable and ſubject to indictment, trial, judgment and puniſhment according to law." The idea of the honorable manager is, that for acts done in the courſe of official duty, a judge muſt be proceeded againſt exclusively by impeachment; and that no indictment will lie in ſuch a caſe. The incorrectneſs of this notion appears not only from a reference to the conſtitution, but to the known law of England alſo. I will remind you of a caſe, ſtated I believe in the elementary books of the law, in which it is ſaid, that if a judge undertakes of his own authority to change the mode of puniſhment preſcribed by law for any crime, he is indictable: for inſtance, ſhould he ſentence a man to be beheaded where the law directed him to be hanged, the judge is guilty of murder, and may be accordingly indicted. When, ſir, I contend that in order to ſuſtain an impeachment, an offence muſt be proved upon the reſpondent which would ſupport an indictment, I do not mean to be underſtood as admitting that the converſe of the propoſition is true; that is, that every act or offence is impeachable which is indictable—far from it: a man may be indictable for many violations of poſitive law, which evince no malameus, no corrupt heart, or intention, but which could not be the ground of impeachment. I will inſtance the caſe of an aſſault, which is an indictable offence, but will not ſurely be pretended to be an impeachable offence for which a judge may be removed from office. It is true that the 2d. ſec. of the 1ſt. article, which gives the houſe of repreſentatives the ſole power of impeachment, does not in terms limit the exerciſe of that power; but its obvious meaning is, not in that place, to deſcribe the kind of acts which are to be ſubjects of impeachment, but merely to declare in what branch of the government it ſhall commence. The houſe of repreſentatives has the power of impeachment, but for what they are to impeach, in what caſes they may exerciſe this delegated power, depends on other parts of the conſtitution, and not on their opinion, whim or caprice. The whole ſyſtem of impeachment muſt be taken together, and not in disjointed parts; and if we find one part of the conſtitution declaring who ſhall commence an impeachment, we find other parts of it declaring who ſhall try it, and what

acts and what persons are constitutional subjects of this mode of trial.—The power of impeachment is with the house of representatives; *but only for impeachable offences:* they are to proceed against the offence in this way when it is committed, but not to *create* the offence, and make any act criminal and impeachable at their wish and pleasure. What is an offence is a question to be decided by the constitution and the law, not by the opinion of a single branch of the legislature; and when the offence thus described by the constitution or the law has been committed, then and not until then, has the house of representatives power to impeach the offender. So a grand jury possesses the sole power to indict, but in the exercise of this power they are bound by positive law, and do not assume under this general power to make any thing indictable which they might disapprove: if it were so, we should indeed have a strange, unsettled and dangerous penal code.—No man could walk in safety, but would be at the mercy of the caprice of every grand jury that might be summoned; and that would be crime to-morrow, which is innocent to-day.

What part of the constitution then, declares any of the acts charged and proved upon judge Chase, even in the worse aspect, to be impeachable. He has not been guilty of treason or bribery; he is not charged with them—Has he then been guilty of "*other high crimes and misdemeanors.*" In an instrument so sacred as the constitution, I presume, every word must have its full and fair meaning; it is not then only for crimes and misdemeanors that a judge is impeachable, but it must be for *high* crimes and misdemeanors; although this qualifying adjective "*high*" immediately precedes and is directly attached to the word *crimes*, yet from the evident intention of the constitution, and upon a just grammatical construction, it must be also applied to "*misdeameanors*"—the repetition of this adjective, would have injured the harmony of the sentence, without adding any thing to its perspicuity. How could this be in common parlance? Suppose it should be said that at this trial, there are attending many ladies and gentlemen; would it be doubted that the adjective "*many*," applies to gentlemen as well as ladies, although not repeated?—or if there is any thing peculiar in this respect, in this word "*high*," I will suppose it were said, that among the auditors there are men of high rank and station; would it not be as well understood as if it were said, that men of high rank and high station are here? there is surely no difference. So in the constitution it is said, that "a regular statement and account of the receipts and expenditures of all public money, shall be published from time to time." Is not the account to be regular as well as the statement? I should have deemed it unnecessary to have spent a word on so plain a point, had I not understood that a difficulty would probably be made upon it. If my construction of this part of the constitution be not admitted, and the adjective "high," be given exclusively to "crimes" and denied to "misdeameanors," this strange absurdity must ensue. That when an officer of the government is impeached for a crime, he cannot be convicted unless it proves to be a high crime; but he may nevertheless be convicted of a misdemeanor of the most petty grade.

Observe, sir, the crimes with which these "other high crimes and misdemeanors," are classed in the constitution, and we may learn something of their character. They stand in connection with, *treason and bribery*, tried in the same manner and subject to the same penalties; but if we are to loose the force and meaning of the word *high* in relation to misdemeanors, and this description of offence must be gov-

erned by the mere meaning of the term "miſdemeanors," without deriving any grade from the adjective, ſtill my poſition remains unimpaired; that the offence whatever it is which is the ground of an impeachment, muſt be ſuch a one as would ſupport an indictment. "Miſdemeanor" is a legal and technical term, well underſtood and defined in law; and in the conſtruction of a legal inſtrument, we muſt give to words their legal ſignifications; a miſdemeanor, or a crime, for in their juſt proper acceptation they are ſynonimous terms, is an act committed or omitted, in violation of a *public* law, either forbidding or commanding it. By this teſt, let the conduct of the reſpondent be tried, and by it, let him ſtand juſtified or condemned.

Does not ſir, the court, provided by the conſtitution for the trial of an impeachment, give us ſome idea of the grade of offences intended for its juriſdiction. Look around you, ſir, upon this awful tribunal of juſtice, is it not high and dignified, collecting within itſelf the juſtice and majeſty of the American people? Was ſuch a court created? Does ſuch a court ſit to ſcan and to puniſh petty errors and indiſcretions, too inſignificant to have a name in the penal code, too paltry for the notice of a court of quarter ſeſſions? This is indeed employing an elephant, to remove an atom too minute for the graſp of an inſect. Is the ſenate of the United States, ſolemnly convened and held together in the preſence of the nation, to fix a ſtandard of politeneſs in a judge, and mark the precincts of a juridical decorum?

The honorable gentleman who opened the proſecution, (Mr. Randolph) has contended for a contrary doctrine, and holds that many things are impeachable which are not indictable. To illuſtrate his principle, he ſtated the caſes of habitual drunkenneſs and profane ſwearing on the bench, what he held to be objects of impeachment and not of indictment. I do not deſire to impoſe my opinions on this court as of any value; but ſurely I could not heſitate to ſay, that both of the caſes put by the gentleman, would be indictable. Is there not known to us a claſs of offences, not provided for indeed by the letter of any ſtatute, but what came under that general protection which the law gives to virtue, decency, and morals in ſociety. Any act which is *contra bonos mores*, is indictable as ſuch; and it is ſo, not by act of congreſs, but by the pure and wholeſome mandates of that common law, which ſome men would madly drive from our juriſprudence, but which I moſt ſincerely pray may live forever.

If I am correct in my poſition, that nothing is impeachable that is not alſo indictable; for what acts then may a man be indicted? May it be on the mere caprice or opinion of any ten, twenty, or one hundred men in the community; or muſt it not be on ſome known law of the ſociety in which he reſides? I muſt unqueſtionable be for ſome offence, either of omiſſion or commiſſion againſt ſome ſtatute of the United States; or ſome ſtatute of a particular ſtate; or againſt the proviſions of the common law. Againſt which of theſe has the reſpondent offended? What law of any of the deſcriptions I have mentioned, has he violated? By what is he to be judged, by what is he to be juſtified or condemned, if not by ſome known law of the country? and if no ſuch law is brought upon his caſe, if no ſuch violation riſes on this day of trial in judgment againſt him, why ſtands he here at this bar as a criminal? Whom has he offended? The houſe of repreſentatives—And is he impeached for this? I maintain, as a moſt important and indiſpenſable principle, that no man ſhould be criminally accuſed, no man

can be criminally condemned, but for the violation of ſome known law by which he was bound to govern himſelf.

Nothing is ſo neceſſary to juſtice and to ſafety, than that the criminal code ſhou d be certain and known. Let the judge as well as the citizen, preciſely know the path he is to walk in, and what he may or may not do; let not the ſword tremble over his unconſcious head, or the ground be ſpread with quickſands and deſtruction, which appears fair and harmleſs to the eye of the traveller. Can it be pretended there is one rate of juſtice for a judge, and another for the private citizen; and that while the latter is protected from ſurpriſe, from the malice or caprice of any man or body of men, and can be brought into legal jeopardy only by the violation of laws, before made known to him, the former is to be expoſed to puniſhment without knowing his offence; and the criminality or innocence of his conduct, is to depend not upon the laws exiſting at the time, but upon the opinions of a body of men, to be collected four or five years after the tranſaction. A judge may thus be impeached and removed from office, for an act ſtrictly legal when done, if any houſe of repreſentatives for any indifinite time after ſhall, for any reaſon they may act upon, chooſe to conſider ſuch act improper and impeachable.

The conſtitution, ſir, never intended to lay the judiciary thus proſtrate at the feet of the houſe of repreſentatives, the ſlaves of their will, the victims of their caprice. The judiciary muſt be protected from prejudice and varying opinion, or it is not worth a farthing. Suppoſe a grand jury ſhould make a preſentment againſt a man, ſtating, that moſt truly he had violated no law or committed any known offence; but he had violated their notions of common ſenſe, for this very ſtandard of impeachment the gentleman who opened gave us; he had ſhocked their nerves or wounded their ſenſibility. Would ſuch a preſentment be received or liſtened to for a momoment? No ſir; and on the ſame principle, no judge ſhould be put in jeopardy, becauſe the common ſenſe of one hundred and fifty men may have been ſhocked by his conduct, or their notions of propriety diſturbed. The common ſenſe of ſome other one hundred and fifty men might approve what is thus condemned, and the rule of right, the objects of puniſhment or praiſe, would thus ſhift about from day to day. Are we to depend upon the houſe of repreſentatives for the innocency or criminality of our conduct? Can they create offences at their will and pleaſure, and declare that to be a crime in 1804. which was only an indiſcretion or pardonable error, or perhaps, an approved proceeding in 1800. If this gigantic houſe of repreſentatives by the uſual vote, and in the uſual form of legiſlation, were to direct that any act heretofore not forbidden by law, ſhould hereafter become penal, this declaration of their will would be a mere nullity, would have no force or effect, unleſs duly ſanctioned by the concurrence of the ſenate and the approbation of the preſident. Will they then be allowed in the exerciſe of their power of impeachment, to create crimes and inflict the moſt ſerious penalties on actions never before ſuſpected to be criminal, when they could not have ſwelled the ſame act into an offence in the form of a law. If this be truly the caſe, if this power of impeachment may be thus extended without limit or control, then indeed is every valuable liberty proſtrated at the feet of this omnipotent houſe of repreſentatives—and may God preſerve us. The preſident may approve and ſign a law, or may make an appointment which to him may ſeem prudent and beneficial, and it may be the general, nay the univerſal ſentiment that it

is ſo, and it is undeniable that no law is violated by the act; but ſome four or five years hence there comes a houſe of repreſentatives, whoſe common ſenſe is conſtructed on a new model, and who either are or affect to be, greatly ſhocked at the atrocity of this act. The preſident is impeached. In vain he pleads the purity of his intention, the legality of his conduct; in vain he avers that he has violated no law and been guilty of no crime. He will be told, as judge Chaſe now is, that the common ſenſe of the houſe is the ſtandard of guilt, and their opinion of the error of the act, concluſive evidence of corruption. We have read, ſir, in our younger days, and read with horror, of the Roman emperor, who placed his edicts ſo high in the air that the keeneſt eye could not decypher them, and yet ſeverely puniſhed any breach of them. But the power claimed by the houſe of repreſentatives to make any thing criminal at their pleaſure, at any period after its occurrence, is ten thouſand times more dangerous, more tyrannical, more ſubverſive of all liberty and ſafety. Shall I be called to heavy judgment now, for an act which, when done was forbidden by no law and received no reproach, becauſe in a courſe of years there is found a ſet of men, whoſe common ſenſe condemns the deed? The gentlemen have referred us to this ſtandard, and being under the neceſſity to acknowledge that the reſpondent has violated no law of the community, they would, on this vague and dangerous ground accuſe, try, and condemn him. The code of the Roman tyrant was fixed on the height of a column where it might be underſtood with ſome extraordinary pains; but here, to be ſafe, we muſt be able to look into years to come, and to foreſee what will be the changing opinions of men on points of decorum and propriety for years to come. The rule of our conduct by which we are to be judged and condemned, lies buried in the boſom of futurity, and in the minds and opinions of men unknown, perhaps unborn.

The pure and upright adminiſtration of juſtice, ſir, is of the utmoſt importance to any people—The other movements of government are not of ſuch univerſal concern—Who ſhall be preſident or what treaties or general ſtatutes ſhall be made, occupies the attention of a few buſy politicians; but theſe things touch not, or but ſeldom, the private intereſts and happineſs of the great maſs of the community—But the ſettlement of private controverſies; the adminiſtration of law between man and man; the diſtribution of juſtice and right to the citizen in his private buſineſs and concern, comes to every man's door, and is eſſential to every man's proſperity and happineſs—Hence I conſider the judiciary of our country moſt important among the branches of government, and its purity and independence of the moſt intereſting conſequence to every man—Whilſt it is honorably and fully protected from the influence of favor or fear from any quarter, the ſituation of a people can never be very uncomfortable or unſafe; but if a judge is forever to be expoſed to proſecutions and impeachments for his official conduct on the mere ſuggeſtions of caprice and to be condemned by the mere voice of prejudice, under the ſpecious name of common ſenſe, can he hold that firm and ſteady hand his high functions require—no; if his nerves are of iron they muſt tremble in ſo perilous a ſituation—In England the complete independence of the judiciary has been conſidered, and has been found, the beſt and ſureſt ſafeguard of true liberty; ſecuring a government of known and uniform laws, acting alike upon every man—It has however been ſuggeſted by ſome of our newſpaper politicians, perhaps from a higher ſource, that although this independent judiciary is very ne-

ceſſary in a monarchy to protect the people from the oppreſſion of a court, yet that, in our republican inſtitution, the ſame reaſons for it do not exiſt; that it is indeed inconſiſtent with the nature of our government that any part or branch of it ſhould be independent of the people from whom the power is derived; and as the houſe of repreſentatives come moſt frequently from this great ſource of power, they claim the beſt right of knowing and expreſſing its will; and of courſe the right of a controling influence over the other branches—My doctrine is preciſely the reverſe of this—If I were called upon to declare whether the independence of judges were more eſſentially important in a monarchy or a republic, I ſhould certainly ſay, in the latter, all governments require, in order to give them firmneſs, ſtability and character, ſome permanent principle; ſome ſettled eſtabliſhments—The want of this is the great deficiency in republican inſtitutions; nothing can be relied upon; no faith can be given either at home or abroad to a people whoſe ſyſtems and operations and policy are conſtantly changing with popular opinion; if however the judiciary is ſtable and independent; if the rule of juſtice between men reſts on permanent and known principles, it gives a ſecurity and character to a country which is abſolutely neceſſary in its intercourſe with the world, and in its own internal concerns. This independence is further requiſite as a ſecurity from oppreſſion. Hiſtory demonſtrates from page to page, that tyranny and oppreſſion have not been confined to deſpotiſms, but have been freely exerciſed in republics both ancient and modern; with this difference; that in the latter the oppreſſion has ſprung from the impulſe of ſome ſudden guſt of paſſion or prejudice, while in the former it is ſyſtematically planned and purſued as an ingredient and principle of the government; the people deſtroy not deliberately, and will return to reflection and juſtice, if paſſion is not kept alive and excited by artful intrigue; but while the fit is on, their devaſtation and cruelty is more terrible and unbounded than the moſt monſtrous tyrant. It is for their own benefit and to protect them from the violence of their own paſſions, that it is eſſential to have ſome firm, unſhaken independent branch of government, able and willing to reſiſt their phrenzy; if we have read of the death of Seneca under the ferocity of a Nero; we have read too of the murder of a Socrates, under the deluſion of a republic. An independent and firm judiciary protected and protecting by the laws, would have ſnatched the one from the fury of a deſpot, and preſerved the other from the madneſs of a people.

I have conſidered theſe obſervations, on the neceſſary independence of the judiciary, applicable and important to the caſe before this honorable court, to repel this wild idea, that a judge may be impeached and removed from office, although he has violated no law of the country, but merely on vague and changing opinions of right and wrong; propriety and impropriety of demeanour. For if this is to be the tenure on which a judge holds his office and character; if by ſuch a ſtandard his judicial conduct is to be adjudged criminal or innocent, there is an end to the independence of our judiciary—In oppoſition to this reaſoning, I have heard (not from the honorable managers) a ſort of jargon about the ſovereignty of the people; and that nothing in a republic ſhould be independent of them—No phraſe in our language is more abuſed or miſunderſtood; the juſt and legitimate ſovereignty of a people is truly an awful object, full of power and commanding reſpect—It conſiſts in a full acknowledgement, that all power originally emanates, in ſome way, from them, and that all reſponſibility is finally, in

ſome way, due to them; and whether this is acknowledged or not, they have, if driven to the laſt reſort, a phyſical force, to make is ſo; but ſir, this ſovereignty does not conſiſt in a right to control or interfere with the regular and legal operations and functions of the different branches of government at the will and pleaſure of the people—Having delegated their power; having diſtributed it for various purpoſes into various channels and directed its courſe by certain limits they have no right to impede it while they it flows in its intended directions, otherwiſe we have no government; in like manner, the officers of government are reſponſible in certain modes and at certain periods for the exerciſe of their duties and power; but the people have no right to make them accountable in any other manner, or at any other period than that preſcribed by the great compact of government; or conſtitution. Having parted with their power under certain regulations and reſtrictions they are done with it; they are bound by their own act and having retained and declared the manner in which they will correct abuſes in office, they have no right to claim any other ſort of reſponſibility; if this be not the caſe, what government have we? What rule of conduct? What ſyſtem of aſſociation? none; But are truly in a ſtate of ſavage anarchy and reſtleſs confuſion; with all the vices incident to civilization without the reſtraints to control them.

Having diſcuſſed this neceſſary preliminary point as to what is or is not impeachable, I will proceed to a conſideration of the charge now in iſſue between the reſpondent and houſe of repreſentatives of the United States; It will be ſome relief to this honorable court to learn, that for the expediting of this trial and to avoid irkſome repetition, the counſel for the reſpondent have devided the articles of impeachment among themſelves—I ſhall beg leave to addreſs you on the firſt articles, while relates to the tranſactions at Philadelphia on the trial of John Fries for high treaſon. The gentleman, (Mr. Early) who has offered you his obſervations on theſe articles of impeachment, appears to have grounded his argument, not on the evidence but on the articles—Suppoſing, perhaps, that they would be proved, he has taken it for granted they have been proved, and has ſhaped his remarks accordingly—Had we filed a general demurer to theſe charges, thereby admitting them as ſtated, the argument of the gentleman might have had the force and application he intended; but if I miſtake not, the reſpondent has pleaded not guilty, and the caſe muſt therefore be decided by the amount of the evidence and not by the averments of the articles; I admit indeed that the honorable managers are put to ſome difficulty in this reſpect—They are under the neceſſity of making their election between the articles and the evidence as the foundation of their argument; for they are ſo totally diſſimilar, that they could not take them both, they meet in ſo few and ſuch immaterial points, that no man can argue from them both for five ſentences. This being the ſituation of the gentleman, he has thought proper to ſelect the articles and the facts therein ſet forth as the foundation of his argument in defiance of the teſtimony. In the obſervations I ſhall have the honor to ſubmit, I propoſe to take the evidence as my text and guide, and leave the articles to ſhift for themſelves, under the care and patronage of our honorable opponents.

Upon reading this firſt article of impeachment againſt the reſpondent, after a due degree of horror and indignation at the monſtrous tyranny and oppreſſion pourtrayed in it, the firſt queſtion that would ſtrike the mind of the enquirer would voluntarily be, When did this horrid tranſaction take place? When and where was it that

judge Chaſe thus perſecuted an unfortunate wretch to the very brink of the grave, from which he was ſnatched by the interference of executive mercy, ſhocked at the injuſtice of his condemnation? When were the rights of juries and the privileges of counſel and their clients, thus thrown down and proſtrated at the feet of a cruel and inexecrable judge? What would this enquirer think and believe on being informed, that theſe atrocious outrages upon juſtice, law and humanity, were perpetrated five years ſince? Why and where has the juſtice of the country ſlumbered ſo long? What now awakes it from this lethargic ſleep? Why has this monſtrous offender ſo long eſcaped the puniſhment of his crimes? To what region of refuge did he fly? But will not ſurpriſe be greatly encreaſed, when it is told that at the time of the trial of John Fries, this injured and oppreſſed man, at the very time when theſe crimes of the judge were committed, the congreſs of the United States, the guardians of our lives and liberties, were actually in ſeſſion in the very city where the deeds were done, and probably witneſſed the whole tranſaction. I do not expect to be anſwered here, for I cannot ſuſpect our honorable opponents of ſo much illiberality, that at that period the adminiſtration of our affairs was in the hands of the political friends of the judge, and therefore he was permitted to eſcape, however atrocious his crimes. Whatever, ſir, may have been the character of that adminiſtration, even if as weak and wicked as it his been repreſented, it could have no object in protecting any individual at ſo great a riſque to themſelves and their reputation. If judge Chaſe had really violated the law and conſtitution to come at the blood of Fries, and had done this in the face of the public, the adminiſtration would have put too much at hazard by endeavoring to ſhelter him. I hope, however, no ſuch reaſon will be given for the neglect of theſe charges; and as we moſt cheerfully and truly confide in the juſtice of the preſent adminiſtration, we truſt no ſuch diſtruſt will be avowed of the integrity of the former. We feel as ſafe under trial now as we ſhould have done then, and look without diſtruſt for the ſame impartial juſtice from this honorable court, we ſhould have expected and received at any time.

We feel however, ſir, a ſerious inconvenience from the delay of this proſecution. In five years facts fall into oblivion, and witneſſes engaged in their ordinary occupations of life, cannot tax their memories with the circumſtances of ſuch diſtant events. It is difficult to diſcover indeed who were preſent at the tranſaction. To guard againſt injuſtice of this kind even in civil caſes, and protect us from fraudulent and ſlumbering demands, a limitation is put by law on the claims of every man. The criminal code of the United States, has juſtly adopted the ſame principle. By a ſtatute, no perſon ſhall be proſecuted or puniſhed for treaſon or other capital offences, with ſome exceptions, unleſs the indictment be found within three years after the offence done; and for ſmaller offences the proſecution muſt be inſtituted within two years. We cannot, it is true, claim the benefit of the letter of this law, but we may claim ſomething from its principle; in expecting from this honorable court every indulgence and allowance for any deficiency in our proof, which ſhould be attributed not to the real weakneſs of our caſe, but to the unreaſonable ſtaleneſs of the charges. Judge Chaſe was a ſtranger in Philadelphia, and neceſſarily found extreme difficulty in diſcovering what perſons were in court at the time to which the charges relate, and to ſelect thoſe who had the beſt recollection of the tranſaction.

This firſt article, ſir, charges, "that

unmindful of the ſolemn duties of his office, and contrary to the ſacred obligation by which he ſtood bound to diſcharge them, faithfully and impartially, and without reſpect to perſons, the ſaid Samuel Chaſe, on the trial of John Fries, charged with treaſon, before the circuit court of the United States, held for the diſtrict of Pennſylvania, in the city of Philadelphia, during the months of April and May, 1800, whereat the ſaid Samuel Chaſe preſided, did, in his judicial capacity, conduct himſelf in a manner highly arbitrary, oppreſſive, and unjuſt." This general accuſation is followed by three diſtinct ſpecifications of offence, to wit:

"1. In delivering an opinion, in writing, on the queſtion of the law, on the conſtruction of which the defence of the accuſed materially depended, tending to prejudice the minds of the jury againſt the caſe of the ſaid John Fries, the priſoner, before counſel had been heard in his defence:

2. In reſtricting the counſel for the ſaid Fries, from recurring to ſuch Engliſh authorities as they believed appoſite, or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions, upon which they intended to reſt the defence of their client:

3. In debarring the priſoner from his conſtitutional privilege of addreſſing the jury (through his counſel) on the law, as well as on the fact, which was to determine his guilt, or innocence, and at the ſame time endeavoring to wreſt from the jury their indiſputable right to hear argument, and determine upon the queſtion of law, as well as the queſtion of fact, involved in the verdict which they were required to give:

In the whole of theſe ſpecifications I am able to diſcover but one truth; the reſt is wholly contradicted and diſproved by the evidence.

It is true, that judge Chaſe did form and reduce to writing, and, in a limited manner, deliver an opinion on a queſtion of law, on the conſtruction of which the defence of the accuſed materially depended; but when the article goes on to charge that this opinion tended to prejudice the minds of the jury againſt the caſe of John Fries, the priſoner, before counſel had been heard in his defence, it is utterly unfounded and untrue. To whom was this opinion delivered? To the counſel for Fries and the attorney for the United States; and to no other perſon. The third copy, and but three were made, never was delivered to the jury or to any other perſon, and never could produce any prejudice or injury to John Fries; nor indeed was it ever intended to come to the knowledge of the jury until they had completely heard the deciſion of the caſe by counſel, when they were to have *taken out* with them this opinion of the judge, upon the law of the caſe ſubmitted to them. At that period of the trial, when it was not only the right but the duty of the court, to ſtate to the jury their opinion of the law ariſing on the facts, then and not until then, was it the intention of the judge to communicate to them this deliberate opinion. Could this be done, with any intention to injure or oppreſs the priſoner? If ſuch was the intention of the act, then, and not otherwiſe, it was criminal.

In enquiring into the nature of this act, I confine myſelf now to the forming and delivery of this opinion, and to decide its innocence or criminality, we ſhould conſider it in relation to its *motive*, its *time and manner*, and its *conſequences*. If nothing partial, oppreſſive, or corrupt, is to be found in any of theſe, I know not in what or from whence the criminality is to be eſtabliſhed. In deciding, ſir, upon the *motive* which prompted the judge to this act, we muſt look for materials in the teſtimony; by this we muſt be governed, and not by the imputations, ſurmi-

ſes, and conſtructions of our opponents, however eloquent and ingenious. The judge and his motives are not only ſtrongly denounced in the article, but have alſo had the ſame fate from the mouths of the managers. I take the evidence for my guide, and I know it will be the guide of this honorable court.

What then, ſir, did judge Chaſe declare himſelf, to be the reaſons which induced him to form this opinion, to reduce it to writing, and to hand it to the counſel? And permit me here, ſir, to ſtate, that in all criminal proſecutions for an act, equivocal in itſelf, and whoſe character of guilt or innocence depends upon the intention with which it was done; the declaration of the party made at the term, are always received in evidence, to aſcertain and fix the true character of the act, and the fair and legal explanation of the act is taken and derived from ſuch declarations of the party, if not diſproved by other evidence. What then did judge Chaſe himſelf ſay of his intention and motives in relation to this opinion?

Mr. Lewis ſtates, that on this occaſion, judge Chaſe ſaid, that he had underſtood that at the former trial *there had been a great waſte of time* on topics which had nothing to do with the buſineſs or caſe, and in reading common law deciſions on the doctrine of treaſon, as well as under the ſtatute of Edward III. before the revolution; and alſo relating to certain acts of congreſs for crimes leſs than treaſon. That *to prevent this in future*, he or they had conſidered the law, made up their minds and reduced it to writing; and in order that the counſel might govern themſelves accordingly, had ordered three copies to be made out, &c. &c. Here then the judge, at the time of the act, now charged to proceed from a corrupt and partial intention, declares in unequivocal language, what were his true motives. His object was to prevent an unneceſſary waſte of time in a court, where a vaſt deal of criminal and civil buſineſs was then depending and waiting for trial. This was the motive and the only motive, declared and avowed by the judge, at the time he delivered this offenſive paper, and, unleſs it be diſproved by the evidence or the circumſtances of the caſe, it muſt be taken to be the true one. It is not a ſubject of enquiry now, whether the reaſon he aſſigned for this proceeding be a good or bad one; it is enough to our purpoſe that it moſt certainly is neither partial nor corrupt. As the motive was not partial, ſo neither was or could be the act oppreſſive to the priſoner, unleſs the judge in executing his deſign of preventing the waſte of time, purſued it to an unreaſonable extent. If he obſtructed only the introduction of irrelevant matter, and did not exclude any thing which could and *ought* to have benefited to the priſoner, he was guilty of no injuſtice or impropriety. If the proper and legal rights of the counſel or of the priſoner were curtailed to his injury, there was certainly injuſtice done; but if nothing more than wholeſome and reaſonable reſtrictions were impoſed, to the manifeſt advantage of the general buſineſs of the court and of other ſuitors there, without any unjuſt detriment to John Fries, then not only the motive was correct, but the act was highly laudable, and ſuch was undoubtedly the caſe. If we go no farther than Mr. Lewis' teſtimony on this ſubject, every idea of intention on the part of the judge, to injure or oppreſs John Fries, is done away. As far as the judge declared himſelf, his intention was pure and correct, and we cannot ſay that in the execution of this correct intention, he would have carried it to ſuch exceſs, and to produce oppreſſion and injuſtice; the deſign was cruſhed in embryo; as far as we are acquainted with it, it is fair and clear of oppreſſion, and we are not authoriſed to pre-

ſume that *if* it had proceeded farther, it would have changed its character and been partial and corrupt. It is well known in Pennſylvania, that the loudeſt clamors are made againſt our courts for the delays of juſtice, and the unreaſonable time ſpent in the trial of every cauſe. Theſe complaints had doubtleſs reached the ears of the judge; there was an enormous liſt of important civil cauſes then before him, and he preſumed that any expedient fairly to ſave time would be acceptable to every body; to counſel as well as to ſuitors. I have as yet, conſidered this part of the caſe in its moſt unfavorable aſpect to the reſpondent; upon turning to the teſtimony of the other witneſſes, its complexion becomes much more mild and unexceptionable. The ſuggeſtion that this opinion made up by the court and handed to the counſel, was declared to be final and concluſive upon them, and that no argument in oppoſition to it was to be permitted or heard, reſts wholly and ſolely on the recollection of Mr. Lewis. Mr. Dallas was not in the court at the time it is ſuppoſed to have happened; no other witneſs, of all that were preſent, have any remembrance of any ſuch declaration, and two witneſſes expreſsly diſprove it. Mr. Edward Tilghman ſtates, that judge Chaſe declared the court had maturely conſidered the law ariſing upon the overt acts, charged in the indictment againſt John Fries; that they had reduced their opinion to writing; that he underſtood a great deal of time had been conſumed upon the former trial, and that, *in order to ſave time*, a copy of the opinion of the court would be given to the attorney of the diſtrict, another to the counſel of the priſoner, and that the jury ſhould have a third *to take out with them*. Mr. Tilghman further ſtates, that previous to the throwing of the papers on the table, and at the moment it was done, the judge expreſſed himſelf in theſe words, "Nevertheleſs, or notwithſtanding, counſel will be heard." Mr. Rawle, a witneſs examined as well as Mr. Tilghman, on the part of the managers, gives the ſame account of the declared motive of the judge, in preparing this opinion, to ſave time, as much had been loſt at the former trial; and ſtates that the judge ſaid, the court had determined to expreſs their opinion in writing on the law, *that they might not be miſunderſtood*. Here we find the reaſon not only for forming the opinion, but for reducing it to writing alſo. The court, continues Mr. Rawle, obſerved, "they had therefore committed their opinion to writing; that the clerk had made three copies, one of which ſhould be given to the diſtrict attorney, one to counſel for the priſoner, and one the jury *ſhould take out with them*. To put this part of the tranſaction beyond doubt, and ſtrengthen, if poſſible, the character it now bears, I beg this honorable court to advert for a moment to Mr. Meredith's teſtimony; he too ſtates, that the judge declared the court, on great deliberation, had formed an opinion on the law on the overt acts ſet forth in the indictment, and that to *ſave time* and *prevent miſtake*, this opinion was reduced to writing, the copies to be diſtributed as mentioned by the other witneſſes. He further expreſsly avers, that the judge, when he threw down the papers declared, that the giving of this opinion was not intended to preclude the counſel from being heard, or from expreſſing any objections to its correctneſs. After this maſs of concurring teſtimony, can the *motive* of the judge in forming and delivering this opinion, be miſrepreſented or miſunderſtood? And can it now be believed or pretended that it was done, as the article charges, to prejudice the minds of the jury againſt John Fries, before counſel had been heard in his defence? In order to bear up this charge againſt this weight of evidence, and ſupport Mr. Lewis' teſtimony, in diſcredit of that delivered by the other witneſſes; the managers, who have ſpoken to this part of the

caſe, pretend that Mr. Lewis ſhould be moſt relied upon, becauſe moſt intereſted in the tranſaction. This intereſt, ſir, may have given a falſe coloring and appearance to the conduct of the judge, and his anxious zeal for his client, may have repreſented the conduct of the court to his mind in harſher views than it deſerved. I have always underſtood that thoſe witneſſes were moſt to be relied upon who were moſt cool and leaſt intereſted in the tranſaction. But the ingenious gentlemen invert this rule. But, ſir, I have no intention of making any compariſon between the credibility of theſe witneſſes, they are all reſpectable, above ſuſpicion. It is a queſtion of memory and not of character between them, and we muſt judge from various combinations of circumſtances in aſcertaining their reſpective correctneſs of memory. Mr. Lewis himſelf, moſt candidly declared his memory to be very uncertain and imperfect of diſtant events; beſides, Mr. Tilghman and Mr. Meredith poſitively aver, that the judge ſaid counſel would be heard on the correctneſs of that opinion; now Mr. Lewis does not and cannot ſay, that the judge did not ſay ſo, but his evidence is no more than this, either that he did not hear it at the time, or that he does not now remember it. I refer the honorable managers to their own rule about affirmative and negative teſtimony. In the Baltimore caſe, a ſingle, ſolitary, unſupported witneſs, (Mr. Montgomery) ſwears to a declaration of the judge, which ſome fourteen or fifteen reſpectable witneſſes, both for and againſt this proſecution, with equal and better opportunities of hearing all the judge ſaid at that time, was not, to the beſt of their knowledge, uttered by the judge, nor any thing like it. Now ſay the managers, this ſingle affirmative, Mr. Montgomery, is more to be depended upon than all the other witneſſes together; and if any body can think ſo, let it be ſo. But in Fries' caſe, we produce two affirmative witneſſes againſt one negative witneſs, who teſtifies himſelf to the imperfection of his memory.

I preſume, ſir, I have moſt fairly eſtabliſhed the point, that the judge in making up this opinion, had really and truly no other object or motive than to prevent a burthenſome and uſeleſs waſte of time; and ſure I am, that whoever attended the firſt trial of Fries, would ſee the neceſſity and propriety of ſome regulation for this purpoſe. How then did the judge carry this intention into execution. The opinion of the court on the points likely to ariſe in the caſe, was put in writing and delivered to the counſel. Was this any diſadvantage to them? Was it not rather a friendly guide to them, by which they might ſhape their argument ſo as beſt to meet the points of difficulty, and ſerve their client. The court furniſh each ſide, the United States as well as the priſoner, with copies of this opinion. This would have the effect to regulate and confine the argument on both ſides to the proper channel, to the real points of difficulty, and prevent a wild, devious and uſeleſs extenſion of the argument into matters wholly irrelevant. It was ſurely an advantage to Fries' counſel thus to know the opinion of the court on the points of law in their caſe, and thus to have an opportunity of meeting and repelling it. If they could convince the court or jury this opinion was erroneous, they would ſucceed for their client. But if the court had permitted the counſel to take the uſual courſe, and had kept their own opinion in cloſe reſerve without any intimation of its direction, until the argument was cloſed, and had then delivered it to the jury, as unqueſtionably they might have done, and this opinion had contained ſome points which had been overlooked by the counſel, ſurely it would have been more prejudicial to the priſoner than the courſe that was purſued. The jury would naturally take the law from the court, and if therefore the judge

intended to have oppreſſed John Fries, he would have ſucceeded better by reſerving his opinion, concealing it from the counſel, permitting them to flounder on in the dark, and then, in his charge to the jury, dictate the law to ſuit his partial and oppreſſive purpoſe. Would any gentleman of the law, about to argue a caſe before a court, think himſelf aggrieved if the judge were previouſly to inform him of ideas he entertained of the caſe, with full liberty to controvert them? It would be eſteemed a favour.

You will be pleaſed to bear in mind, ſir, that this paper containing the opinion of the court, was not read, nor was their any declaration whatever of its contents or ſubſtance. It was known to none; it was intended to be made known to none, but the counſel for whoſe uſe it was deſigned—How then could it produce any prejudice to John Fries. No attempt was made; no intention manifeſted to read it. It was privately handed to Mr. Lewis. How then did it become public; in what manner were copies diſtributed to various hands? not ſir, by the court, but by the counſel of John Fries—Mr. Lewis, in a moment of real or affected indignation, threw the paper from him; declared his hand ſhould not be polluted by it, and caſt it upon the table of the court, and it does not appear that to this hour he knows the contents of the paper he ſo haſtily condemned; ſeveral gentlemen of the bar by this means got hold of it, and ſome copies were taken—But for this conduct on the part of Mr. Lewis, no body ever could have known the contents of the paper or the opinion of the court. It was this that gave publicity to the opinion, and extended a knowledge of its contents, not only without the deſign and concurrence of the court, but decidedly againſt them. The act of the court was thus thrown into a different courſe and direction than was ever intended or contemplated by them.

What then, ſir, is the whole amount of the crime of the judge on this occaſion—That he a law judge, had been bold enough to form an opinion; not on John Fries's caſe, or the facts and circumſtances of it, for he knew them not; but on certain abſtract points of law, without firſt conſulting and hearing Meſſrs. Lewis and Dallas; and further, he had not only formed ſuch opinions, but he had the audacity to put them into the hands of theſe gentlemen, which, in the article of impeachment, is called "delivering the opinion." The judge then, on mature deliberation, from a full conſideration both of Engliſh and American precedents and deciſions, had really made up his mind upon what overt acts would conſtitute the treaſon of levying war; and to *prevent miſtake*, he had reduced this opinion to writing; and for the information of the counſel on *both ſides* (no partial ſelection) he gave a copy of this opinion to each of them; and *intended* to give another to the jury to *take out*, with them. The jury ſhould have his opinion on paper when they could not miſtake it, inſtead of their memories when it might be miſunderſtood. Is not this, ſir, a fair and juſt epitome of the facts given in evidence? Is it not the full meaſure and amount of the judges crime and corruption? If the judge had a right to have any opinion of his own on the caſe; and if the opinion he formed was a correct one, and it is admitted or at leaſt not denied to be ſo, where or whence could any injury ariſe from it to John Fries or his counſel—The opinion is ſupported by Engliſh authority, and by the higly reſpectable names of judges Patterſon and Iredell; and this opinion judge Chaſe had an undoubted right to give to the jury. He never intended to give it until the argument was cloſed; and then he deſigned to

vary from the uſual mode of charging juries, only in this, that *to prevent miſtake* and for more certainty, he would deliver it in writing inſtead of verbally. Yet the article charges that in conſequence of the forming and delivering this opinion in this illegal manner, John Fries was convicted and ſentenced to death. The undiſputed correctneſs of this opinion wipes away every idea of an intention to injure or oppreſs John Fries.——No injuſtice could reſult to him from a legal and correct opinion, which muſt have finally ruled the caſe, delivered at any time and in any manner. There might be ſome inattention to uſual forms, but there could be no ſubſtantial injury. An opinion thus anticipated, if manifeſtly unſound and erroneous and againſt the priſoner, might carry ſome ſuſpicion of unjuſt prejudice, but how *corrupt intentions* are to be proved, manifeſted, or executed by *correct opinions*, is to me inexplicable. The judge had taken much labour and particular pains to inform himſelf on the law of the caſe, he would not truſt himſelf on haſty opinions made up at the moment, where the life of a fellow citizen was at ſtake, and might be the forfeit of an error; and he therefore carefully examined the law and deliberately took an opinion. For this unuſual attention he deſerves thanks, and not impeachment. If knowledge of the law be a crime in a judge, ignorance is his beſt recommendation, and that judge is moſt worthy and beſt qualified for his office who poſſeſſes no opinions of his own on any legal ſubject, but preſents himſelf as a ſcholar to be taught by the counſel, and has no impreſſions but ſuch as they are pleaſed to give him.

I mean not to paſs a ſentence of condemnation on the views or conduct of the counſel of Fries. Their ſole object and anxiety were to ſave the life of their client; and if they believed they could better effect this end by taking fire at the conduct of the court; by exciting a ſtrong feeling and prejudice againſt the mode of proceeding, and by involving the court in embarraſſment and difficulty, it was for them to judge how far they might purſue this object by ſuch means; and to their own judgment I ſubmit it. It is not eaſy to ſay how far counſel may fairly go in ſuch a caſe, and when the life of the client is in iſſue much more will be allowed than in common caſes.

We have heard much about the agitation of the bar on this occaſion: the particular cauſe of it has not been clearly explained. It might have been produced by the demeanor of Mr. Lewis, which from his own account was violent and indignant; or it might have been by the mere buſtle produced by the different efforts that were made to get hold of this noxious paper, which Mr. Lewis caſt from him with ſo much feeling as too foul for his hand, or from a combination of theſe with other cauſes. Another circumſtance, equally immaterial, has been dignified with much importance by the attention the managers have beſtowed upon it—I mean the *novelty* of the proceeding.—Every witneſs was aſked in ſolemn form "Did you ever ſee the like before"—"How long have you been a practicing lawyer"—"How many criminals have you defended"—"Was not this mode of forming and giving opinions by the court a novelty to you." Granted—It was a novelty—I ſay, granted for argument ſake, it was a *novelty*—and what follows? Is it therefore impeachable? Every innovation however juſt and beneficial is ſubject to the ſame conſequence. But, ſir, if this novelty proceeded not from impure intentions, and was not followed by oppreſſive or injurious conſequences, where is its injuſtice or criminality.—There were many other novelties in that trial: It was a novelty that a man named John Fries ſhould commit treaſon and be tried and convicted for it: I never heard of preciſely the ſame

thing before. It was a novelty that counsel should desert their cause in the abrupt manner in which it was then done—But I presume it will not be pretended that these things were wrong merely because they were novel; much less that a judge is to be convicted of high crimes, and removed from office for a harmless novelty. The articles charge not the judge with innovations and novelties in legal forms, but with depriving John Fries and his counsel of their constitutional rights; and if he has not done this, the rest is of no importance now. But what is this strange novelty that excites so much interest and alarm? Is it that a law judge had a law opinion, and was capable of making it up for himself without the assistance of learned counsel? I hope not. I should be sorry to suppose this is a novelty in the United States. Was it then the reducing of this opinion to writing, putting it on paper with pen and ink that makes the danger novelty? To have the opinion is nothing, but to write it constitutes the crime: and yet, sir, where is the difference to the prisoner, except that in the latter case there is more certainty; less chance of misapprehension and mistake on the part of the jury, than when it is delivered to them verbally. It should be recollected, sir, and I am sure it is too important to be forgotten by this honorable court, that this written opinion contained all the limitations and discriminations on the law of treason which could serve the prisoner, as well as those which might operate against him. But, sir, I deny that there was so much novelty either in forming this opinion, or in reducing it to writing, as is pretended. Is it uncommon for judges to state their opinions on particular points of law to counsel, even before argument, for the direction of their observations; and was it ever before considered a prejudication of the case, or an encroachment upon the right of the bar. In criminal courts the practice is constant and universal.—Previous to the trial of the cases of treason after the restoration of Charles II. the judges of England met together, and did form and did also reduce to writing, opinions, not only upon the mode of proceeding upon the trials, but also on all those questions or points of law, which they supposed would arise and require their decision in the course of the trials. See Kelyng's Reports, pa. 1—2, &c. 9—11. Here the judges met in consultation expressly for the purposes now deemed so criminal in judge Chase, and even took to their aid the king's counsel. Our judge did not take to his assistance the attorney of the United States in forming his opinion; nor did the judges in England deliver to the counsel of the accused the result of their deliberations, but doubtless, it would have been received as a favour if they had. In the only two points of difference, therefore, between the two cases, we have most decidedly the advantage.

But, sir, how can the proceedings of judge Chase, in *principle* and *effect*, be distinguished from the common and universal practice of charging grand juries, on the legal nature and description of the crimes to come under their notice? When a judge is about to hold a criminal court, he is particular to introduce into his charge those very offences, and his opinions upon them, which by information or otherwise, he supposes will be brought before the court. The opinion of the judge on such cases is formed, is reduced to writing, and is publicly delivered in the presence of all the jurors, both grand and petit, but never was before conceived to be objectionable—nor was it ever before supposed to be a prejudication of any man's case who might afterwards be tried for an offence thus defined. Judge Chase stated that acts in his opinion would, in construction of law, amount to treason by levying war; but whether those acts and the necessary intention

which must accompany them, would be proved upon John Fries, or any body else, was left entirely at large to be decided by the jury on the evidence. In Hardy's trial, for treason in 1794, pa. 13, chief justice Eyre states to the grand jury: "Jurors and judges ought to feel an extraordinary anxiety that prosecutions of this nature should proceed upon solid grounds. I can easily conceive therefore, that it must be a great relief to jurors placed in the responsible situation in which you now stand, bound to do justice to their country and to the parties accused, and anxious to discharge this trust faithfully; sure I am that it is consolation and comfort to us, who have upon us the responsibility of declaring what the law is in cases in which the public and the individual are so deeply interested; to have such men as the great Sir Matthew Hale, and an eminent judge of our own times, who, with the experience of a century, concurs with him in opinion, Sir Michael Foster, for our guides.

To proceed by steps—From these writers upon the law of treason (who speak, as I have before observed, upon the authority of adjudged cases) we learn, that not only acts of *immediate* and *direct* attempt against the king's life, are overt acts of compassing his death, but that all the *remoter steps* taken with a view to assist to bring about the actual attempt, are equally overt acts of this species of treason; even the meeting and the consulting what steps should be taken in order to bring about the end proposed, has been always deemed to be an act done in prosecution of the design, and as such an overt act of this treason.—This is our first step in the present enquiry. I proceed to observe, that the overt acts I have been now speaking of have reference, nearer or more remote, to a *direct* and *immediate* attempt upon the life of the king; but that the same authority informs us, that they who aim directly at the life of the king (such, for instance, as the persons who were concerned in the assassination plot in the reign of king William) are not the only persons who can be said to compass or imagine the death of the king. "The "entering into measures which, in the nature of things, or in the common "experience of mankind, do obviously "tend to bring the life of the king in-"to danger, is also compassing and im-"agining the death of the king;" and the measures which are taken will be at once evidence of the compassing, and overt acts of it."

Where is the criminality of such instruction and such direction; but in what does it differ in principle and in all its possible consequences to the prisoner, from the conduct of judge Chase. The learned English judge thought he was obliging the jury, not encroaching on them; by stating fully and precisely the legal construction of those acts which would probably be given to them in evidence to support the charges of treason. It is true the treason charged upon Hardy was not that of levying war, it was that of compassing the king's death. Now, what overt acts amount to a compassing of the king's death, is a question of law resting upon long and established decisions and precedent: and judge Eyre thought it no crime to declare to the jury, his opinion of the law in this respect. So, in our case, treason by levying war, is a general constitutional definition of the offence, but the application of this general definition, and the fixing and describing such overt acts as amount to a levying of war, is matter of legal construction, depending upon a knowledge of former adjudications, which the judge was bound to know, or he was not worthy of his office, and which he was also bound to communicate to the jury. The difference in the cases is only here: Chief justice Eyre formed his opinion on deliberation and he reduced it to writing—but he also pub-

fically delivered it with all the weight of his name and authority in the face of all the jurors and of the country: whereas judge Chaſe gave his opinion privately to the counſel, to be at their diſpoſal and diſcretion; to uſe it for the benefit of their client if they could; or to diſregard and ſuppreſs it if they thought proper. It might forever have been concealed from the jurors and from the world, if the counſel of Fries had not themſelves made it public. This practice of delivering opinions on points of law in charges to grand juries, is not confined to the Engliſh courts. It is the ſame in the United States. The managers have pronounced a very deſerved eulogium upon the official conduct and character of judge Iredell. The reſpondent has been referred to him as a bright example of juſtice and impartiality and it has been lamented that with ſuch an example before him, judge Chaſe ſhould have ſo wandered from the path of rectitude. We take their ſtandard of excellence. We agree to be judged by judge Iredell, and if I ſhew that this humane and learned judge really did the ſame thing for which the reſpondent now ſtands on his trial, I hope there will be an end of the complaint. On the firſt trial of this ſame John Fries, for the ſame offence, judge Iredell actually committed, with ſome circumſtances of aggravation, the ſame enormous crime for which judge Chaſe is now impeached. He did form an opinion on the law of treaſon, he did reduce that opinion to writing, and he did deliver that opinion, the ſame in ſubſtance and nearly the ſame in words, with that delivered by judge Chaſe. This bright example was before our eyes, he is now ſo, and let us be judged by him. In the charge delivered to the grand jury in 1799, who found the firſt bill againſt Fries for treaſon, ſpeaking of thoſe caſes which he thought would come before the court, the judge ſays,—"The only ſpecies of treaſon likely to come before you, is that of levying war againſt the United States. There have been various opinions, and different determinations on the import of thoſe words. But I think I am warranted in ſaying, that if in the caſe of the inſurgents who may come under your conſideration, the intention was to prevent by force of arms the execution of any act, of the congreſs of the United altogether, (as for inſtance the land tax act, the object of their oppoſition) any forcible oppoſition calculated to carry that intention into effect, was a levying war againſt the United States, and of courſe an act of treaſon. But if the intention was merely to defeat its operation in a particular inſtance, or through the agency of a particular officer, from ſome private or perſonal motive, though a higher offence may have been committed, it did not amount to the crime of treaſon. The particular motive muſt however be the ſole ingredient in the caſe, for if combined with a general view to obſtruct the execution of the act, the offence muſt be deemed treaſon."

Judge Iredell, therefore, ſo far from conceiving it to be a crime to have an opinion upon the law of treaſon, of levying war and the overt acts which would conſtitute it, to reduce that opinion to writing and to deliver both to counſel and jury, ſeems to have conſidered it, as chief juſtice Eyre had done before him, to be his duty to do ſo. The opinion delivered by this reſpectable judge, coincides entirely with that of judge Chaſe, and the manner of delivering was, on our opponents principles, vaſtly more exceptionable. The novelty of this proceeding ſeems to have vaniſhed on inveſtigation. There is indeed one ſtriking difference in the two opinions; that judge Chaſe goes more fully and clearly into the definition of the offence, and is more particularly careful to ſtate thoſe diſtinations and diſcriminations which might ſerve the accuſed and reduce his tranſgreſſion to ſome ſmaller

offence, provided they ſhould appear in his caſe. He ſets out not only the deſcription and character of thoſe overt acts which do conſtitute treaſon, but enumerates alſo with equal care, ſuch as will not amount to that offence. If theſe favorable diſcriminations might in any way be uſeful to the accuſed, they were put fully into the power both of the counſel and the jury.

The gentleman who opened the proſecution (Mr. Randolph) took occaſion to ſpeak in very handſome, and I doubt not very deſerved terms of applauſe of a diſtinguiſhed judge in Virginia. This ſame judge has publiſhed an edition of Blackſtone's Commentaries; into which he has introduced a variety of his own opinions on the conſtitution and laws of the United States. If hereafter a perſon accuſed, under the operation of ſome of thoſe ſtatutes on the conſtruction of which judge Tucker has publiſhed his comments and opinions; would it be any impeachment of the juſtice and impartiality of this judge, to ſay, he had made up his opinion, he had reduced it to writing, he had delivered it to the world, and therefore he had prejudged the caſe? No, this would be a ſort of reaſoning even more abſurd than the Richmond *non ſequitur*. The honorable manager, (Mr. Randolph) to enforce and exemplify his doctrines on this ſubject, put an analogous caſe. He ſtated that a judge holding a criminal court, might properly give the legal deſcription of murder, and the circumſtances and ingredients that in point of law would conſtitute the offence; but, ſays he, he may not go on to apply this definition to the overt acts laid in the indictment. This I confeſs is a *novelty* to me. I never before heard of overt acts in an indictment for murder; the general charge of the offence is laid in legal and general terms, but there is no ſpecifications of the particular facts and circumſtances by which the charge is to be ſupported. But ſuppoſe a judge, knowing that a man was coming before him for trial, *accuſed* of going into the ſtreet with a declared reſolution to kill the firſt perſon he ſhould meet; and this judge were to ſay to any perſon or in any place, verbally or in writing, that a killing under ſuch circumſtances, was murder, and a full manifeſtation of malice in a legal conſtruction. Would this be called a prejudication of the caſe? Is it not a mere declaration of the law exiſting and eſtabliſhed long before the caſe, which it was the duty of the judge to know, to obey and to declare. If the facts proved before the jury brought the accuſed within the law, the conſequence of conviction followed, not by the will of the judge, but by the ſentence of the law; and while this queſtion was left open, the caſe was in no wiſe prejudged. To explain this point ſtill further, I will put the caſe of *libelling*. This offence, like that of treaſon, conſiſts of two parts, the *act* and the *intent*. Would it be criminal in a judge, knowing that ſuch a caſe was to come before him, to inform himſelf, if neceſſary, of the law of libels, to make up his mind upon the conſtituent parts of the offence, and to declare them to the grand jury, the counſel, or any body elſe; might he not be of opinion, and write, and ſay, that a libel is a malicious defamation of any perſon in writing, in order or intending to excite their wrath or to expoſe them to public hatred or contempt. Here the fact of publication muſt be proved and the malicious intent; and might not a judge ſtate what, in contemplation of law, is a malicious and defamatory writing, and that if ſuch a one is publiſhed with *intent* to injure and defame, it is in law a libel. Apply this doctrine to the caſe of Fries. May not a judge have an opinion and declare, that an inſurrection of any body with intent or in order to reſiſt the execution of any law of the United States, and the carrying that intent into execution by actual force and violence, is treaſon againſt the United States by levying war.

There is no prejudication in either caſe; the facts and the intent which conſtitute the crime, and on which the guilt or innocence of the accuſed depends, are left wholly untouched, and come without prejudice or biaſs to the jury. I have heard the phraſe "prejudging the law," repeated over and over again. Judge Chaſe *prejudged the law* againſt Fries, we are told; I confeſs the phraſe is a very ſingular one to me; I know not preciſely how to underſtand it: I can comprehend what is meant when I hear of prejudging a man's caſe, in prejudging the facts of any caſe; but as to the law, I preſume it is always prejudged, always ſettled, certain and aſcertained. It is never a queſtion in a caſe of murder, whether a killing with malice prepenſe is or is not murder. The law has prejudged that; and ſo in all other caſes the queſtion is, whether the facts proved being the caſe within the law; and ſo it was in Fries' caſe; and upon that point judge Chaſe neither gave, nor intimated, nor had an opinion, for as the evidence had not been heard, he could not anticipate what facts would be proved.

I hope and truſt, ſir, that the firſt ſpecifications of this article is now diſpoſed of to the ſatisfaction of this honorable court, and the complete juſtification of the reſpondent; part of it when teſted by the evidence, turns out to be wholly unfounded; and the reſt, which is true, has been fully juſtified both on principle and by precedent. If there was ſome haſte and error in the conduct of the judge, which however I neither believe nor admit, there was certainly no criminality in the act, there was nothing impure in the motive, nothing injurious in the conſequence.

Suffer me now, ſir, to offer you ſome obſervations on the ſecond ſpecification of the firſt article of impeachment. I hope it will not be neceſſary to treſpaſs greatly on your patience in refuting it.—It charges judge Chaſe with "reſtricting the counſel for the ſaid John Fries from recurring to ſuch Engliſh authorities as they believed appoſite, or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions, upon which they intended to reſt the defence of their client." This charge conſiſts of two parts; it complains of a reſtriction as to Engliſh authorities, and as to American ſtatutes: I will conſider them diſtinctly.—Firſt ſir, permit me to remark, that theſe allegations are made to ſupport the general charge of partiality, oppreſſion and injuſtice. But what becomes of theſe pretences when we bear in mind the teſtimony of Mr. Rawle, then diſtrict attorney, and always, and in every ſituation a gentleman whoſe character, in all its relations both public and private, bears the firſt ſtamp of reſpectability and fears no competition for credit. He has informed this honorable court that this reſtriction ſo grievouſly complained of and now the ſubject of a criminal proſecution, was impoſed upon him as well as upon the counſel of Fries.—Is this the character or the conduct of partiality or oppreſſion—Does it evince that ſtrong appetite the judge is ſaid to have to drink the hearts blood of this unfortunate German, and ſtain the pure ermine of juſtice with gore. I have always underſtood by partiality in a judge, a favoring bias to one party to the prejudice of the other; but when a reſtriction is put equally on both ſides, I cannot conjecture how it can be reſolved into partiality or oppreſſion. It will be ſeen preſently that as far as this reſtriction could have any operation, it was friendly in that operation to John Fries. But, ſir, what was this reſtriction ſo much complained of and now magnified into a high crime? That certain Engliſh deciſions on the law of treaſon made before the revolution of 1688 ſhould not or ought not to be read to the jury—

And pray sir, what were these decisions? I will take their character from Mr. Lewis himself, and no man is better acquainted with them. He says they were the decisions of corrupt and dependent judges, who carried the doctrines of constructive treasons to the most dangerous and extravagant lengths. True they were so; sanguinary, cruel and tyrannical in the extreme: and could the exclusion of such cases injure John Fries? If cases which extenuated and softened the crime of treason had been rejected, he might indeed have suffered; but how he was or could be injured by keeping from the jury those cases which aggravated his offence, I am really at a loss to learn. The restriction then was on the United States. Had they been adduced by the district attorney, no doubt they would have been ably answered by the defendant's counsel; but the ability of the counsel for the United States was not inferior to Fries' counsel; and if judge Chase had indeed a design to oppress and injure John Fries, and to convict him on strained constructions of treason, his best policy would surely have been to have suffered these cases to come forward, and if supported by his authority and the talents of the counsel of the United States they might have had their influence with the jury, notwithstanding the able refutations they might have received.—But why and for what good purpose did the counsel desire to read these cases, operating, if they operated at all, directly against the life of their client. Why would they fatigue the court and impose upon the jury with those wicked and ridiculous decisions against a man who wished his stag's horns in the king's belly—and another, who declared he would make his son heir to the crown. Sir, there could have been but one object in this attempt: it was this, to excite such horror in the minds of the jurors by reciting these tales of tyranny and blood, as would create a general prejudice in them against all the law of treason. The abhorrence which would be honestly given to such extraordinary cases of cruelty practiced under the law of treason, they hoped would extend itself to all cases of treason, even the most just and upright. I know another and an ingenious colouring and pretence has been given for this design, this strange anxiety to read cases which so strongly support prosecutions for treason. It has been said by Mr. Lewis, not here as a witness but in Philadelphia as counsel for John Fries, that his object in desiring to read these extravagant cases was of this sort; that many of the decisions on the law of treason made since the revolution of 1688, and which are received as authorities in modern courts, were actually grounded on the iniquitous cases decided before the revolution; and therefore, says Mr. Lewis, we wished to lay these cases before the jury that they might place no reliance on those since the revolution which were derived from them. Could the gentleman be sincere in this pretence—How far would he carry it? To all decisions since the revolution, and are we to have no adjudications on this subject which may be relied upon as sound, legal and virtuous? I apprehend he does not mean so much as this—He desired, I presume, only to discredit such of the English decisions since the revolution as were derived from those corrupt sources alluded to; then, most assuredly, he was premature in his attempt to read these precious cases. If the district attorney should read, and rely upon any case decided since the revolution to convict John Fries, and Mr. Lewis could trace that decision back to the horrible times spoken of, and shew that it was derived from and grounded upon the opinions of those corrupt and dependent judges, it would surely have been competent for him to do so, and no court would have attempted to prevent him. But that he is to deluge the court and jury with a

maſs of traſh and corruption, and ſo declared to be by himſelf, by way of anticipation and when no neceſſity had occurred or probably would occur to juſtify it, could not be endured by any court knowing its duties and reſpecting its dignity. Theſe caſes are law, or they are not law. If the former, their operation and influence were againſt the priſoner; if the latter, the court ſhould not ſuffer them to be read, to miſlead and impoſe upon the jury.

So far, ſir, and I ſhall trouble you no farther, on the excluſion of theſe Engliſh authorities—Now, as to the ſtatutes of the United States—That any ſuch reſtriction was laid upon the counſel of John Fries, reſts wholly and entirely on the teſtimony and recollection of Mr. Lewis. I will, ſir, firſt conſider the nature and extent of this charge againſt the reſpondent, ſuppoſing the fact to be—I preſume it will be granted to me that a judge has ſome ſort of authority in a court; that he does not ſet there as a mere cypher, without power or command—Among the acknowledged powers of a judge, is that of regulating and directing in ſome degree the argument before him, and of preventing the introduction of matter either groſsly improper or palpably irrelevant to the iſſue. If then it be demonſtrated that theſe ſtatutes of the United States had really and truly nothing under heaven to do with the trial of John Fries. I hope the judge will not be condemned for excluding them. John Fries, ſir, was indicted for the treaſon of levying war againſt the United States; and for no other offence. This crime is created and defined by the conſtitution of the United States. It became the duty of the attorney of the United States, to ſhew to that court and jury that the priſoner had been guilty of the treaſon charged in the indictment according to its definition and deſcription in the conſtitution, or the proſecution muſt fail. If, on the other hand he did ſhew this to the ſatisfaction of the court and jury, John Fries muſt neceſſarily be convicted—Now ſir, what poſſible influence or controul could any act of congreſs have over the character of a crime defined in and derived from the higher authority of the conſtitution. The act of congreſs could not enlarge, reſtrict or in any way alter or affect the conſtitutional deſcription. To what proper purpoſe then could any act of congreſs be read? Why, ſir, we have heard ſomething about a legiſlative conſtruction of the conſtitution; and that theſe acts of congreſs defining ſedition and other offences, might be uſed and were important to ſhew what was intended by the conſtitution in the deſcription of treaſon. In the firſt place, ſir, congreſs in paſſing theſe ſtatutes never had the moſt remote idea or intention of giving any ſort of conſtruction or opinion upon the law of treaſon; and if they had ſuch an intention, it was beyond their powers and rights and ſhould be wholly diſregarded, not only by that court but by this. The conſtruction of the conſtitution, in common with every other law, belongs excluſively to the judiciary, as beſt qualified both from its permanency and independence as well as from legal learning, to exerciſe ſo important a right. The neceſſity of a power exiſting ſomewhere to judge of the conſtitution and of the conformity or non-conformity of laws to the proviſions of it, reſults from the very nature of a written conſtitution; it is vain we have an inſtrument paramount to ordinary legiſlation if there is no authority to check encroachments upon it, and there is no department of government with whom this power can be ſo ſafely lodged, or by whom it can be ſo ably and impartially exerciſed as the judiciary. If the legiſlature, the very branch of government moſt controlled by the conſtitution, and intended to be ſo, ſhall be permitted to aſſume the wide and unlimited right of conſtruction, the conſtitution will ſink at once into a dead and worthleſs letter, moulded into various fantaſtick ſhapes at the

will of the legiſlature, and purporting one thing to day and another to-morrow and nothing at laſt; but congreſs, I repeat ſir, in paſſing the ſedition law, had no intention whatever of giving their conſtruction to the conſtitutional deſcription of treaſon, or of affecting or touching it in any way. The counſel of Fries were therefore about to uſe or abuſe the act of the legiſlature to purpoſes never contemplated or intended! Should the court ſuffer a deluſion of this ſort to be practiſed upon a jury, equally diſreſpectful to the court and to the congreſs. It was not judge Chaſe only who thought theſe ſtatutes of the United States totally irrelevant to the caſe of Fries. They had been ſolemnly adjudged to be ſo, after every exertion of the talents of the counſel to ſhew their application and force.—I refer you ſir, to the opinion of jude Iredell, on the firſt trial of Fries.

"An act of Congreſs which I have already read to you (that commonly, called the ſedition act) has ſpecially provided in the manner you have heard againſt combinations to defeat the execution of the laws. The combinations puniſhable under this act muſt be diſtinguiſhed from ſuch as in themſelves amount to treaſon, which is unalterably fixed by the conſtitution itſelf. Any combinations therefore, which before the paſſing of this act, would have amounted to treaſon, ſtill conſtitute the ſame crime. To give the act in queſtion a different conſtruction, would do away altogether the crime of treaſon as committed by levying war, becauſe no war can be levied without a combination for ſome of the purpoſes ſtated in the act, which muſt neceſſarily conſtitute a part, though not the whole of the offence."

"This, gentlemen of the jury, is an indictment againſt the priſoner at the bar, for levying war againſt the United States; the firſt enquiry therefore is, what is meant by theſe words of our conſtitution. 'Treaſon againſt the United States, ſhall conſiſt only in levying war againſt them,' &c. Theſe words are repeated verbatim, I believe in an act of Congreſs, called the judiciary act, defining the puniſhment of the crime of treaſon, purſuant to conſtitutional authority. This crime being defined in the conſtitution of our country, becomes the ſupreme law, and can only be altered by the means therein pointed out, and not by any act of the legiſlature; and, therefore, the repetition of the words of the conſtitution in the judiciary act is quite unneceſſary, as the only power left to congreſs over this crime was, to deſcribe the puniſhment: the ſame act in another part, makes proviſion for the method of trial. Agreeable to their power, congreſs have deſcribed the puniſhment, and thereby declared the crime to be capital. It is clear therefore, that, as the conſtitution has defined the crime, the congreſs, drawing its ſole authority from that conſtitution, cannot change it in any manner, particularly as it is ſo declared; yet the counſel for the priſoner ſay, that the legiſlature have given it a legiſlative interpretation, and that their interpretation, is binding on this court. They ſay that congreſs did not mean to include the offence charged upon the priſoner at the bar, under the definition of levying war; becauſe the ſedition act deſcribes a ſimilar offence, and becauſe a reſcue is provided for in another act, the puniſhment extending no farther than fine and impriſonment.—Several anſwers may be given to remove theſe objections:

Firſt, if congreſs had intended to interpret theſe words of the conſtitution by any ſubſequent act, they had no kind of authority ſo to do. The whole judicial power of the government is veſted in the judges of the U. States, in the manner the conſtitution deſcribes; to them alone it belongs to explain the law and conſtitution; and congreſs have no more right nor authority over the judicial expoſitions of thoſe acts, than this court has to make a law to bind

them. If this was not an article of the conſtitution, but a mere act of congreſs, they could not interpret the meaning of that act while it was in force, but they may alter, amend, or introduce explanatory ſections to it.—In this we differ from the practice of England, from whence we received our juriſprudential ſyſtem in general; for they having no conſtitution to bind them, the parliament have an unlimited power to paſs any act of whatever nature they pleaſe; and they, conſequently, cannot infringe upon the conſtitution. The very treaſon ſtatute of Edward, III. itſelf, contains a proviſion giving parliament an authority to enact laws thereupon, in theſe words: 'Becauſe other like caſes of treaſon may happen in time to come, which cannot be thought or declared at preſent: it is thought, that if any ſuch does happen, *the judges ſhould not try them without firſt going to the king and parliament, where it ought be judged treaſon, or otherwiſe felony.*' On this point Sir Matthew Hale was very careful, leſt conſtructive treaſon ſhould be introduced.

This, gentlemen, you will obſerve, only relates to any caſe not ſpecified in that act. But, on the occaſion now before you, it is not attempted by any conſtruction or interpretation, that any thing ſhould be denominated treaſon, that is not preciſely and plainly within the conſtitution. No treaſon can be committed except war has actually been levyed againſt the United States.

But farther, nothing is more clear to me than that congreſs did not intend in any manner whatever, to innovate on the conſtitutional definition of treaſon, becauſe they have repeated the words, I think, verbatim in their own act, with regard to the reſcue and obſtruction of proceſs which is mentioned in the act alluded to: it will not be pretended by any man, that every reſcue, or every obſtruction of an officer in ſerving proceſs, or even both together, amounts to high treaſon, or elſe to no crime at all: No; the crimes are differently ſpecified, and reſcue or obſtruction of proceſs, may be committed without that high charge. This, I think, was ſufficiently explained by the counſel for the United States."

Will it be pretended, ſir, that counſel have a right to read any thing before the court which they may find in a law book; is there any thing of ſuch peculiar dignity and privilege in the ſtatutes of the United States, that any of them may at all times and on all occaſions, whether pertinent or not, be read in a court of juſtice; and it is a high crime in a judge to prevent it—Suppoſe the counſel had choſen on the trial of Fries to amuſe themſelves with reading the revenue laws of the United States; would the mere circumſtance of their being bound in our ſtatute book have given them ſuch a ſacred character that the court would be bound to liſten with the moſt reſpectful attention to ſuch an abſurd waſte of time. I do not heſitate to aver that the revenue laws have full as clear and proper an application to the caſe of John Fries as either of the ſtatutes the counſel were ſo anxious to produce.

But, ſir, although judge Chaſe undoubtedly believed that theſe ſtatutes of the United States had no ſort of application to the caſe before him, and we contend that he would have been wholly juſtifiable in excluding them from the diſcuſſion, yet we deny, moſt explicitly, that he did ſo. The reſpondent never declared that theſe laws ſhould not be read or referred to on that occaſion. The proof of the fact reſts entirely on the recollection of Mr. Lewis. Among the numerous ſpectators of this tranſaction not a man but Mr. Lewis has been produced to ſuſtain this charge now deemed ſo important. Mr. Lewis has doubtleſs declared the fact as he believes it; but ſir, when we recollect the agitation of this gentleman as deſcribed by himſelf—the ſtrong ſtate of feeling or paſſion into which he was excited, the length

of time and the acknowledged frailty of his memory; and when to this we add that something was probably said about the irrelevancy of these statutes, we shall find sufficient reason to believe that Mr. Lewis has, in this respect, fallen into a mistake: opposed to this imperfect recollection we have Mr. Rawle, Tilghman, Meredith, Biddle, and Ewing, all possessing an equal opportunity with Mr. Lewis to hear and to understand what passed from the court; and from their cool and disinterested situations less likely to receive unfounded or discoloured impressions. I cannot avoid reminding you, sir, that Mr. Tilghman, and Rawle, are witnesses summoned and examined on the part of the United States; and although the honorable managers have thought proper to claim only Mr. Lewis and Dallas, and to treat the other gentlemen as witnesses for the respondent; they are nevertheless entitled to the full regard and respect, whatever it may be, attached to the witnesses for the majesty of the people. The five gentlemen I have named, were all of them, in court during the trial of John Fries, and at the time Mr. Lewis supposes this restriction to have been laid upon him, and yet not one has any recollection of any such prohibition; I believe they, or some of them, state in decided terms that none such was made. If on this comparison of the recollection of five witnesses, against one who himself testifies to the imperfection of his memory, leaves any doubt about the truth of the fact, I can refer this honorable court to a written document, drawn up by Mr. Lewis in conjunction with Mr. Dallas, which must put the question to rest. When there is such a contradiction in the testimony of such respectable witnesses, it is a great relief to my mind, to have some permanent voucher to refer to, to decide the difference; I allude, sir, to the letter addressed by Messrs. Lewis and Dallas to Mr. Lee, then attorney general of the United States; this letter was written in May, 1800, soon after the trial of Fries, and when every circumstance was fresh on the memory of Mr. Lewis. This letter was written in consequence of a communication from Mr. Lee, stating that the case of Fries was before the president; that *all the information* was wished, which could assist in making a proper decision upon a claim for mercy and pardon; for which purpose Mr. Lee desired to know the grounds on which the counsel intended to have enforced the defence. In consequence of this solemn and important call from such high authority and for such an interesting purpose, Mr. Lewis writes to Mr. Dallas, states that in justice to "*poor Fries*," as well as to themselves, they ought to make the desired communication, that they should state their intended arguments, &c. &c. and that they should state "in decent, but manly terms, *our reasons for declining any interference in the trial*;" he then requests from Mr. Dallas, *every communication* "likely to render service to *poor* Fries." Turn then, sir, to the letter addressed to Mr. Lee, with all these friendly dispositions on the part of Mr. Lewis, with all the anxious desire he had to serve poor Fries, and with all the aid of Mr. Dallas in making the statement, which was to contain *all* their information on the subject, and *all* their reasons for declining to interfere in the trial. We find sir, in this important letter, that they inform the president that the "*cause* was prejudged" by an opinion they were wholly unacquainted with, by a paper they had never read and knew not the contents of; and the jury were also *prejudiced* by this opinion, although they knew not what it was; and we find a good deal of irritation against the court in this letter. But, sir, we do not find any complaint whatever, nay, not the slightest suggestion that the court prevented or forbid the reading of these statutes of the United

States, or reſtricted the counſel from making any uſe of them they thought proper. With the manifeſt diſpoſition of theſe gentlemen in writing this letter, with the object before them for which it was required, and the uſes they intended ſhould be made of it, uſes which they anticipated at the moment they abandoned the cauſe, is it probable ſo important a circumſtance would have been omitted if it had really occurred? I refer you and this honorable court, ſir, to the following pages of the evidence printed at the laſt ſeſſion of congreſs for the uſe of the houſe of repreſentatives—pages 21, 24, 25, 26, to 32.

May I not now flatter myſelf, ſir, that all the criminality charged upon the reſpondent, in the ſecond ſpecification of the firſt article of impeachment, is waſhed from the mind of this honorable court. Under this hope and impreſſion, I will proceed to conſider as briefly as poſſible, the third and laſt ſpecification. In this the judge is charged with "debarring the priſoner from his conſtitutional privilege of addreſſing the jury, (through his counſel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the ſame time endeavoring to wreſt from the jury their indiſputable right to hear argument, and determine upon the queſtion of law, as well as the queſtion of fact, involved in the verdict which they were required to give." This charge is abſolutely unfounded and untrue; and is, in all its parts moſt completely diſproved by the evidence. As to debarring counſel from being heard, I need only refer you, ſir, to the teſtimony of Meſſrs. Tilghman and Meredith, who expreſsly ſwear, that judge Chaſe when he threw down the paper containing the opinion the court had formed on the law, explicitly declared, that nevertheleſs, counſel would be heard againſt that opinion. It is indeed true that Mr. Lewis ſeems throughout the buſineſs, to have been under an impreſſion that nothing would be heard in contradiction to that opinion, and that his profeſſional rights were invaded; but this appears to be a haſty and incorrect inference or concluſion of his own, from the conduct of the court; he wholly miſapprehended the court, and has charged his miſapprehenſion to their account. This is the uſual effect of ſuch precipitate proceedings. The managers have greatly relied on this circumſtance; they urge that Mr. Lewis, through the whole of the affair and in all he ſaid concerning it, took for granted and ſtated, that he was debarred from his conſtitutional privileges. He did ſo; but he did ſo under a miſtake of his own, not proceeding from the court. It is not only that no other witneſs ſpeaks of any ſuch reſtriction but expreſsly negative it, and ſay, ſome of them at leaſt, that none ſuch was impoſed; but Mr. Rawle has further informed you, that it appeared to him throughout the buſineſs, that Mr. Lewis had wholly miſunderſtood the court, and miſtook their intention. But, ſurely ſir, we are not to be condemned becauſe we have been miſunderſtood; eſpecially as the miſtake ſeems to be peculiar to Mr. Lewis, and no other witneſs fell into the ſame error. I rely moſt implicitly on Mr. Rawle's teſtimony, not only from the ſtrength and correctneſs of his character, but from the unuſual pains he took to be accurate in his knowledge of this tranſaction. His notes are copious, connected, and ſatisfactory, and although he has no notes of the firſt days proceeding, yet he ſeems to have given an uncommon nd cautious attention to every circumſtance to which he has teſtified. This gentleman negatives every idea of any reſtriction upon the arguments of counſel, and is ſupported by every witneſs but Mr. Lewis. If any doubt can remain upon this ſubject, I am happy to have it in my power to refer to a written and unchanging document, which deſtroys this third ſpecification, and demonſtrates not only that the

counſel were not prohibitted from addreſſing the jury, both on the law and the fact, but alſo that the right of the jury to decide both the law and the fact, was moſt largely and explicitly avowed and declared to them. I beg to refer this honorable court to the ſecond exhibit, filed with the reſpondent's anſwer. It contains this very opinion ſo ſcorned by the counſel of Fries, and from the pollution of which they ſhrunk with ſuch horror. If they had read it before it was thus indignantly condemned, if it had been underſtood before it was conſigned to contempt, and denounced as a violation of every valuable and ſacred right, how much confuſion, how much unneceſſary diſcontent might have been ſaved and prevented. In this opinion then, will be found this ſentiment, in theſe words: "It is the duty of the court in this, and in all *criminal* caſes, to ſtate to the jury, their opinion of the *law*, ariſing on the facts; *but the jury are to decide on the preſent, and in all criminal caſes, both the law and the facts, on their conſideration of the whole caſe.*" Was there ever a more ample and explicit avowal of the right of juries? Is there any friend of juries ſo extravagant as to contend or aſk for more? The acknowledgement is as full as any man can require, or the law would warrant. The judge, in thus admiting and confirming the right of the jury to decide both the law and fact, admits by inevitable conſequence, that the jury have a right to hear counſel both upon the law and facts. That which they are to decide upon, they muſt have information upon; and the court which declares the jury to be the tribunal to determine the *whole* caſe, never could have ſaid, in the ſame breath, that they ſhould hear no argument on the caſe they were thus to determine. This monſtrous abſurdity, of which the judge can hardly be ſuſpected, brings it to a certain concluſion, that Mr. Lewis muſt have miſtaken the court; and that no ſuch reſtriction was laid upon him or the jury, as he has apprehended.

The charges, ſir, laid in this firſt article of impeachment, are grounded altogether on the proceedings of what has been called the firſt day of Fries' trial; and, moſt firmly believing that the whole of his proceeding on that day will bear the moſt ſcrutinizing enquiry, and ſtands on the ſtrong ground of juſtification, I have been willing to meet the managers on that day's tranſactions, diſjointed from thoſe of the following day; but, ſir, it is moſt evident that this is by no means a full or a fair examination of the judges conduct on that occaſion. When he is charged with a corrupt or partial intention to injure and oppreſs John Fries; when he is charged with a wilful violation of the rights of the counſel and the jury, the whole of the proceeding ſhould be brought into view before we decide upon the character of any part of it. An attention, ſir, to what paſſed on the ſecond day, as it is called, of Fries, will moſt abundantly prove that the judge never had intended any partiality or oppreſſion againſt him; and certainly, that if he had any ſuch intention, he never carried it into execution or effect; and I truſt I am ſafe in ſaying, that the mere intention to commit a crime, however groſs and outrageous, unleſs carried into ſome ſort of action or effect, conſtitutes no offence. A man may intend to commit a larcenary, aſſault and battery, or any other offence, but while he abſtains from the act, the mere intention cannot ſubject him to trial or puniſhment. The reſpondent then, diſcovering from the conduct of Fries counſel, and the indignant hoſtility they aſſumed, that he was greatly miſunderſtood; that an arrangement he had adopted for the convenience of public juſtice, the reaſonable expedition of the approaching trial, and the real accommodation of the court, the counſel, and

the jury, was conſtrued and received as an oppreſſion upon the priſoner, an encroachment upon the privileges of counſel, and violation of the rights of the jury; in ſhort, as a corrupt and polluted prejudication of the cauſe to be tried, and that the fair and upright intentions of the court were miſinterpreted by a real or pretended miſtake, into the vileſt purpoſes of partiality, reſolved to deſtroy the formidable engine he ſaw erecting againſt the court, and to remove at once all pretence for clamour or irritation. Granting the judge had been in error on the firſt day; what could he or any man do more than to rectify the error as ſoon as diſcovered, and haſten to the right path before any injury could have reſulted from his momentary deviation. But the honorable manager has told you, he had ſinned beyond the grace of repentance, and that no contrition, however ſincere, could wipe away the offence. When I ſuffer ſuch words as repentance and contrition to eſcape my lips, it is in quoting preciſely the words of the manager. For my own part I diſclaim them, the reſpondent had done nothing that required the humiliation of repentance, or for which he now aſks to be forgiven; let him ſtand on his juſtification or ſtand not at all. But, ſir, a part of that juſtification is, that the corrupt intent charged upon him, is diſapproved by his entire willingneſs to permit the counſel to manage their cauſe in their own way if they diſapproved of his, and by his full and candid retraction of the error, if any error had been committed. By adverting to the teſtimony of Mr. Rawle, this honorable court will ſee, how greatly judge Chaſe was ſurpriſed to find from converſing with this witneſs and judge Peters, that his conduct was viewed in ſo ſtrange a light by Meſſrs. Lewis and Dallas. On making this diſcovery, although ſtill convinced of the propriety of his proceeding, he does not obſtinately adhere to it, but reſolves to move all poſſible cauſe of complaint by withdrawing all the papers which had given riſe to this aſtoniſhing irritation and violence. The papers were accordingly reſumed, every copy collected, and the counſel, the priſoner, and the jury, were placed in the ſame preciſe ſituation as if theſe papers had never been diſtributed; with the moſt ample acknowledgement of all their rights, and the moſt urgent ſolicitations to them to proceed in the enjoyment and exerciſe of them. But no; the counſel had taken their ground, and nothing could move them. John Fries had received their inſtructions, and with equal perſeverance declined the aid of other counſel offered to him by the court repeatedly. Now ſir, let me aſk you and this honorable court, on your conſciences, not to be blinded by the management and fineſſe of ingenious counſel—what was the meaning of all this? What was the object of it? Did the counſel now believe they would not be fully heard in defence of their client, both on law and fact? Did they now ſuppoſe themſelves or the jury reſtricted in their rights, or that a juſt and impartial trial would not be had? No ſuch thing; moſt certainly not. But, in the language of Mr. Lewis, they thought they had got the court in an error, or a ſcrape, and they were determined to keep them there. What, ſays judge Peters, if we have done wrong, will you not ſuffer us to repair that wrong by doing what is right, by doing all that you have required? No; No; was the anſwer. Mr. Lewis has declared to you, ſir, in the moſt ample and explicit terms, that they abandoned John Fries, becauſe they thought they took a better chance of ſaving him by this means, than they could have by any trial; and to uſe his own words in another part of his teſtimony, "we withdrew," ſays he, "from the defence of John Fries, becauſe we thought it would beſt ſerve him, and *we were not influenced by any other motive whatever.*" They had already, before

judge Iredell, tried the efficacy of the full and unconfined exertion of their talents in his defence, and found how vain the attempt was. They were well satisfied no hope of success could be entertained on a fair trial of the merits of their case both in law and fact, and they eagerly grasped any occurrence, that, by operating upon the passions, the humanity, or the prejudices of mankind, might give their client a chance for escape, which he could not look for in the merit of his own conduct. With this view they most solemnly impressed upon the mind of Fries, the necessity of his maintaining the ground they had taken for him, and refusing the assistance of any other counsel. So well did these gentlemen know the court had no intention of oppressing John Fries, that in their communications to him, they anticipated the offer of other counsel to supply their desertion.

But, sir, there is one circumstance, in this second day's proceeding, which has been introduced to shew that the respondent continued the same tyrannical spirit with which he is charged on the first day, and which it may be incumbent on him to remove; I mean the "unkind menace," as it has been termed by one of the witnesses, used to the counsel of Fries, when the judge told them they would proceed in the defence at the hazard, or on the responsibility of their characters. To ascertain the true nature of the expression, whatever it was, which fell from the court in this respect, I will refer to the same guide I have endeavoured to follow throughout my argument, I mean, the evidence: the aspect of this pretended menace will then be changed into a complimentary confidence in the discretion of the counsel, or at least into no more than such a menace as every gentleman of the bar acts under in every case; that is, to manage every cause before a jury with a due regard to their own reputations; to urge nothing as law to the jury which they are conscious is not law, and to introduce no matter which they know to be either improper or irrelevant. This, in its worst character, will be found to be the whole amount of this terrific menace. What account does Mr. Lewis give of this occurrence. After stating that the court manifested a *strong desire* that he and his colleague should proceed in the defence of their client; that every restriction, if any had been imposed, was now removed, and they were at full liberty to address the jury on the law and the fact, as they thought proper; the judge said that this would be done "under the direction of the court, and at the peril of our own characters, *if we conducted ourselves with impropriety*"—and was it not so? and where is the criminality of saying so. Mr. Lewis did not consider this as a menace intended to restrict him in the exercise of the rights just before conceded to him by the court, but rather as an unwarranted suspicion of his sense of propriety; for, says he, "I did not know of any conduct of mine to make this caution necessary." The court perhaps thought his conduct on the day before, did make it necessary. Let us now take Mr. Dallas's impression of this part of the conduct of the judge. This witness after testifying to the ample range, both as to law and fact, given to the counsel by the court, states, that the judge observed, "they would do this *at the hazard of their characters.*" This Mr. Dallas afterwards terms an "unkind menace"—I think upon recurring to Mr. Lewis and the other witnesses, and to some considerations naturally arising from the manifest disposition of the court at that time, it will be concluded that Mr. Dallas has mistaken the nature and character of this act of the judge, when he describes it as a menace. Mr. Tilghman states, that the court seemed *very anxious* that the counsel should proceed, gave them full liberty to combat judge Chase's opinion before the jury, and

that they were not to be bound by that opinion. Judge Chaſe mentioned, that caſes at common law before the ſtatute of Edward 3d. *ought* not to be read—ſo, of certain other caſes; he particularly mentioned the caſe of the man who wiſhed the ſtag's horns in the king's belly, and alſo of the man who kept a tavern with a ſign of the crown, who ſaid he would make his ſon heir to the crown: the judge declared ſuch caſes muſt not be cited, and ſaid, on illuſtration of this idea, what caſes from Rome, from Turkey, and from France: that the counſel ſhould go into the law, but muſt not cite caſes that were *not law*. After theſe obſervations and in direct connection with and reference to them, the judge ſaid, ſomething about "their proceeding *agreeably to their own conſciences*." What now begins to be the complection and character of this part of the judges behaviour—Why, that after giving to theſe gentlemen the utmoſt latitude of diſcuſſion they could poſſibly require, he ſtates a certain claſs of deciſions and caſes, which appeared to him and muſt to every body to be unworthy of notice, to be of no ſort of authority or application in the caſe of Fries; which were not law; which Mr. Lewis himſelf has deſcribed as the offspring of corrupt and dependent and bloody judges; and which, if they had any operation, were hoſtile to the priſioner: I ſay, ſir, after alluding to ſuch caſes, which he knew too has been uſed on the former trial, was it criminal or ſtrange, he ſhould make an appeal to the conſciences or characters, take it either way, of theſe gentlemen before they proceeded to their defence. A further examination of teſtimony, puts this part of the caſe beyond doubt. Mr. Rawle, after ſtating the ſame courſe of obſervations from the judge as have been mentioned by Mr. Tilghman, and that he ſaid, "I have always conducted myſelf with candor, and I meant to ſave you trouble"—After relating to you how fully the reſpondent removed every obſtacle which had ariſen from the proceeding of the firſt day, and how honorably he explained and juſtified the motives of his conduct, declared himſelf thus to the counſel—"Having thus explained the meaning of the court, you will ſtand acquitted or condemned to your own conſciences." The ſame term uſed by Mr. Tilghman—"as you think proper to act, do as you pleaſe." This honorable court will be pleaſed to recollect that Mr. Rawle ſpeaks not from the imperfect impreſſions of memory after the lapſe of five years, but from full notes taken at the very moment of the tranſaction. It is needful to go further in juſtification of this miſtaken menace: what ſays Mr. Ewing, that the reſpondent told the counſel, that if they read caſes which were not law, after knowing the opinion of the court that they were not ſo, they would do it with "a view to their own reputations."—Mr. Meredith, after reciting what the judge obſerved upon the caſes at common law, teſtifies, that the reſpondent informed the counſel of Fries "they might manage the defence in ſuch way as they thought proper, having regard to their own characters."

I hope ſir, we have now obtained a juſt notion of the nature and intent of whatever was ſaid by the judge at this period of the tranſaction; and as no witneſs conſidered it as a menace but Mr. Dallas, we may juſtly conclude that he has miſtaken it. Is not this the true interpretation of it, that the judge had determined to give theſe gentlemen the utmoſt latitude of diſcuſſion, both of the law and fact, to any extent they thought proper, referring them only to their own ſenſe of propriety, to their own conſciences, to their regard for their own characters, as to the manner in which they would uſe this unbounded liberty. The reſpondent confided in the character and conſcience of theſe gentlemen for the fair exerciſe of their profeſſional duty,

and for such a limitation of their privilege of speech as would prevent any abuse of it to improper purposes or to an unreasonable extent. Suffer me, sir, to offer one further remark in confirmation of my position. It grows out of the acknowledged circumstances of the case, and if fairly deduced, is evidence of the highest description. It is agreed by all the witnesses, that on the second day the respondent manifested and expressed the utmost solicitude and anxiety for the counsel to proceed in the defence; that he "took great pains," to induce them to do so. It is not doubted that he was sincere in this. Is it probable or possible then, with these dispositions and while he was endeavouring to persuade and to induce these gentlemen to return to the defence of their client, he would indulge himself in threats, in insults, and menaces, which would necessarily confirm them in the abandonment of the cause and defeat the acknowledged wish the judge had that they should return to it.

But, still we are told, and this first article of impeachment concludes with avering, that in consequence of the conduct of the respondent, Fries was deprived of his right of being heard and defended by his counsel. To refute this unfounded assertion, we need go no further than to the testimony of Mr. Lewis and Dallas; they surely are the best judges of the motives of their own conduct. What reason do they give for denying Fries their aid, and advising him to refuse all other counsel? Because they had no hopes of success on a trial; because they believed the court had got into a difficulty where they were determined to keep them; because they thought they had a better chance to save their client's life by the uses they might make of the novelty of the first day's proceeding; that they could have on a full trial after this novelty was removed; the counsel, in short, withdrew from the defence of Fries, "because they thought it would best serve him, and *were not influenced by any other motive whatever*" How does this testimony support the averment in the conclusion of the article, which boldly affirms, not that John Fries was saved, but that he was condemned to death in consequence of not being heard by his counsel.

A very strange and unexpected effort has been made sir, to raise a prejudice against the respondent on this occasion, by exciting, or rather forcing, a sympathy for John Fries. We have heard him most pathetically described as the ignorant, the friendless, the innocent John Fries. The *ignorant* John Fries. Is this the man who undertook to decide that a law, which had passed the wisdom of the congress of the United States, was impolitic and unconstitutional; and who stood so confident of this opinion, as to maintain it at the point of the bayonet? He will not thank the gentleman for this compliment, or accept the plea of ignorance as an apology for his crimes. The *friendless* John Fries. Is this the man who was able to draw round himself a band of bold and determined adherents, resolved to defend him and his wild doctrines, at the risque of their own lives and of the lives of all who should dare to oppose. Is this the John Fries who had power and friends enough, actually to suspend, for a considerable time, the authority of the United States over a large district of country; to prevent the execution of the laws, and to command and compel the officers appointed to execute the law, to abandon the duties of their appointment, and lay the authority of the government at the feet of this friendless usurper. The *innocent* John Fries. Is this the man against whom a most respectable grand jury of Pennsylvania, in 1799, found a bill of indictment for high treason, and who was afterwards convicted by

another jury equally impartial and reſpectable, with the approbation and under the direction of a judge, whoſe humanity and conduct on that very occaſion, has received the moſt unqualified praiſe of the honorable manager who thus ſympathiſes with Fries. Is this the John Fries againſt whom a ſecond grand jury, in 1800, found another bill for the ſame offence, founded on the ſame facts, and who was again convicted by a juſt and conſcientious petit jury. Is this *innocent* German the man, who, in purſuance of a wicked oppoſition to the power and laws of the United States, and a mad confidence in his ability to maintain that oppoſition, reſcued the priſoners duly arreſted by the officers of the government, and placed thoſe very officers under dureſs; who, with arms in his hands and menace on his tongue, arrayed himſelf in military order and ſtrength, put to hazard the ſafety and peace of the country, and threatened us with all the deſolation, bloodſhed and horror of civil war; who at the moment of his deſperate attack, cried out to his infatuated followers, "come on, I ſhall probably fall on the firſt fire, then ſtrike, ſtab, and kill all you can." In the fervid imagination of the honorable manager, the widow and orphans of this man, even before he is dead, are made, in hypotheſis, to cry, at the judgment ſeat of God, againſt the reſpondent; and his blood, though not a drop of it has been ſpilt, is ſeen to ſtain the pure ermin of juſtice. I confeſs, ſir, as a Pennſylvanian, whoſe native ſtate has been diſgraced with two rebellions in the ſhort period of four years, my ear was ſtrangely ſtruck, to hear the leaders of one of them addreſſed with ſuch friendly tenderneſs, and honored with ſuch flattering ſympathy by the honorable manager.

It is unuſual, ſir, in public proſecutions, for the accuſed to appeal to his general life and conduct in refutation of the charges. How proudly may the reſpondent make this appeal. He is charged with a violent attempt to violate the laws and conſtitution of his country, and deſtroy the beſt liberties of his fellow citizens. Look, ſir, to his paſt life, to the conſtant courſe of his opinions and conduct, and the improbability of its charge is manifeſt. Look to the days of doubt and danger; look to that glorious ſtruggle ſo long and ſo doubtfully maintained for that independence we now enjoy, for thoſe right of ſelf government you now exerciſe, and do you not ſee the reſpondent among the boldeſt of the bold, never ſinking in hope or in exertion, aiding by his talents and encouraging by his ſpirit; in ſhort, putting his property and his life in iſſue on the conteſt, and making the loſs of both certain by the active part he aſſumed, ſhould his country fail of ſucceſs. And does this man, who thus gave all his poſſeſſions, all his energies, all his hopes to his country and to the liberties of this American people, now employ the ſmall and feeble remnant of his days, without intereſt or object, to pull down and deſtroy that very fabric of freedom, that very government and thoſe very rights he ſo labored to eſtabliſh. It is not credible; it cannot be credited, but on proof infinitely ſtronger than any thing has been offered to this honorable court on this occaſion. Indiſcretions may have been hunted out by the perſeverance of perſecution; but I truſt moſt confidently, that the juſt, impartial, and dignified ſentence of this honorable court, will completely eſtabliſh to our country and to the world, that the reſpondent has fully and honorably juſtified himſelf againſt the charges now exhibited againſt him, and has diſcharged his official duties, not only with the talents which are conceded to him, but with an integrity which is infinitely more dear to him.

FRIDAY, February 22d.

Mr. KEY,

Mr. President, and gentlemen of this honorable court,

I rise to make some observations on the 2d. 3d. and 4th. articles of impeachment exhibited against the respondent, the honorable Mr. Chase. I shall make no apology for my inadequacy to the task, because I have voluntarily engaged in it, nor shall I preface my argument with any exordium, at a period of time when every moment is precious, and when I feel the utmost confidence, that this honorable body on so momentous an occasion, will indulgently hear, maturely weigh, and impartially decide, on the merits of the case: my only regret arises from severe indisposition, which has rendered me less capable of doing justice to the subject, and of defending my honorable friend.

As my observations apply to those articles which relate to the conduct of Mr. Chase in Virginia on the trial of Callender, and to those only, it may be proper to take a view of the situation in which the judge found himself at the commencement of it. The sedition law had passed in 1799, and this together with the alien bill, from causes not necessary to explain, had excited the public attention, and greatly agitated the public mind. In Virginia the sedition law was peculiarly obnoxious: many thought it unconstitutional, and most thought it impolitic—the enemies of the bill believed, or affected to believe, that the press, the palladium of liberty and security of political rights, was endangered, in violation of the terms of the constitution. The friends of the bill tho't the liberty of the press more likely to perish under the ruins occasioned by its licentiousness, and believed that to punish persons for publishing what was false scandalous and malicious, and edited with *intent to defame*, was a salutary restraint, more calculated to preserve than to destroy it. In this conflict of public opinion, with a great majority in Virginia opposed to the law, did Mr. Chase in the ordinary assignment of judicial districts, arrive in Richmond, wholly a stranger. Previous to his arrival, a publication infamously disgraceful and libellous, had made its appearance, in favor of a character idolized by that commonwealth. It was easy to foresee that a prosecution would take place, that the constitutionality of the sedition law would be contested; and I need not apprise this honorable court, that where a law is considered as peculiarly obnoxious, much of its odium is transfered to the makers, and more to the characters carrying it into effect.

Soon after the arrival of the judge, and early in the session of the court, the grand jury found a presentment and then an indictment against James T. Callender, as the author of the libel before referred to: this brought things to an issue, talents were immediately enlisted on the popular side of the question; young men of aspiring minds volunteered their services; and every thing that sophistry and ingenuity could devise, was brought into action to defeat the operation of the law, and remove the case from the decision of a judge, whose strength of mind and energy of character were much to be dreaded. Accordingly exceptions were taken at every point of the cause, and when the jury were about to be sworn, incidents arose, which laid the foundation of the 2d. article of impeachment; "That, prompted by a similar spirit of persecution and injustice, at a circuit court of the United States, held at Richmond, in the month of May, one thousand eight hundred, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then president of the United States; the said Samuel Chase with intent to oppress, and procure the conviction of the said Callender, did overrule the objections of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind as to the publication from which the words, charged to be libellous in the indictment, were extracted; and the said Basset was accordingly sworn, and did serve on the jury, by whose verdict the prisoner was subsequently convicted." Take from this article the harsh epithets applied to the conduct of the judge and there is nothing in it; and happily epithets do not constitute criminality; facts must be proved.

The charge is "*that judge Chase with intent to oppress and procure the conviction of Callender, did overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the jury,*" &c.

In order to sustain this article it is incumbent on the honorable managers to establish three positions.

1st. That Basset did himself object and wish to be excused from serving on the petit jury.

2dly. That his objection was overruled in violation of the principles of law.

3dly. That the judge did so overrule the objection from corrupt motives, and with intent to oppress and procure the conviction of Callender.

The ardor to convict the respondent has made the honorable managers bid defiance to the stubborness of fact, and deny the clearest principles of law; for as to the fact, I call on

them in reply, to point out the evidence that ſupports their aſſertion that Baſſet wiſhed to be excuſed from ſerving on the jury. One would ſuppoſe that no better teſtimony can exiſt than that which Baſſet himſelf gives. He has been ſworn at bar, and what does he ſay on oath? Does he bear the article out in its ſtatement of fact? Certainly not: he ſwears that he did not object to ſerving on the jury; that he did not wiſh or aſk to be excuſed. He ſtated that he had ſome ſcruples which he conceived proper to mention to the court, and if not diſqualified by law, he was willing to ſerve on the jury, and carry the ſedition law into effect. He had ſeen in a newſpaper ſome extracts ſaid to be taken from the work called "the Proſpect Before Us," and for editing which Callender then ſtood indicted, and he thought that ſuch a book would come within the ſedition law, but he added he had never ſeen the book, nor did he know the author: he further ſtated, that he did not wiſh to be excuſed from ſerving on the jury. I appeal to this honorable body, if this teſtimony bears out the fact as charged in the article: it is not proved as laid: there is no teſtimony that Baſſet wiſhed to be excuſed, and not wiſhing to be excuſed, the very fact on which the reſpondent's guilt is predicated, fails in proof, and failing in proof, it would ſeem unneceſſary further to notice this article: the foundation once gone, its ſuperſtructure, the criminal inference drawn from it, falls baſeleſs to the ground.

But I cannot in juſtice to the reſpondent content myſelf here, I will proceed to ſhew the argument of the honorable managers to be as unfounded in law, as their fact charged is deſtitute of proof; and that they may have no cauſe of complaint, I will meet them on their own grounds. I will for the ſake of argument admit, "that Baſſet did wiſh to be excuſed from ſerving on the jury," and then examine if the overruling the objection was contrary to law.

In my opinion the court acted properly, and their conduct was ſtrictly legal. Let us examine the law of challenges as ſuccinctly as poſſib'e, ſo far as applicable to the caſe. Challenges in their general diviſion, are of two kinds, to the array, and to the polls. A challenge to the array goes to the whole pannel, and although at Richmond there was a feint attempt to quaſh the pannel by one of the counſel, yet it was only mentioned to be abandoned, and ſerved no other purpoſe than to ſhew the eager anxiety of counſel to let ſlip no exception however frivolous and untenable; and to indicate to the court what might be expected in the progreſs of the cauſe.

A challenge to the polls, is an exception taken to an individual on the pannel when he comes to be ſworn as a juror. In this caſe, no cauſe of challenge was made, no exception taken, or offered to be taken to Mr. Baſſet.—When a challenge is made there are two modes of trial if a juror ſtands indifferent, the firſt mode is by two triors, who are conſtituted, where two or more have been ſworn on the jury, of the two firſt who have been ſo ſworn. This mode was not reſorted to by Callender's counſel.

The next mode is by ſwearing the perſon himſelf, as to his indifferency, which he muſt anſwer in all things except that he is not bound to criminate himſelf. Now what is the meaning of being indifferent as applied to a juror, may be learned from the oath of the triors, and from various authorities ſtating in what the indifferency is to conſiſt: a juror muſt ſtand indifferent, that is, "not actuated by malice or favour." Indifference does not mean that a juror ſhould have no knowledge of the facts, or of the law, or of the parties: on the contrary, if a perſon has declared his opinion on facts, it does not render him incompetent to ſerve as a juror; nay if a perſon has on the *ſame* indictment ſerved as a juror and found another perſon guilty, this is no exception or challenge to him in trying another perſon on the ſame indictment; in ſupport of theſe legal poſitions I refer to the following authorities: to wit. Rolles Abridgment, title trial, fol. 657, where it is laid down, that "if a juror has ſaid that he will find for one of the parties, it is a good cauſe of challenge for favor, if he ſo ſpoke from favor; but if he did not ſpeak it out of favor but from his knowledge of the matter in iſſue, it is not a good cauſe of challenge."

And alſo in the ſame folio, it is further laid down as law, "that it is no cauſe of challenge to a juror, that he hath ſaid, that he will find his verdict for one of the parties, if it is not found by the triors or the court, that he ſpoke from favor and not from the truth of the fact."

In folio 655, of the ſame author, and in Trials Per Pais, it is ſaid, "that if a juror hath twenty times declared that he will find for one of the parties, it is not a principal challenge, *becauſe, he might have ſpoke it from his knowledge of the matter in iſſue, and not out of favor or malice.*"

In Kelynge, folio 9, and Trials Per Pais, folio 178, jurors were challenged by the priſoner, becauſe they had given a verdict already, and had found others guilty on the *ſame indictment*, and held to be no cauſe of challenge.

Trials Per Pais 179, Salkeld 144, ſtates the

oath of a trior in these words, "you shall well and truly try, whether A (the juror challenged) stands *indifferent, between the parties to this issue.*"

From these authorities it is clear that to be indifferent as applying to a juror, means that he should not be actuated by malice or favor with respect to the parties, for in one of the authorities it is expressly determined, that if a person says he will find the verdict one way for one of the parties, this is not a cause of challenge, if he spoke from his knowledge of the case, and not under the influence of malice or favor; and in another of the authorities, a juror had served on a jury, had on oath made up his mind on the fact and the law, by concurring in the verdict of guilty, and yet held no cause of challenge to prevent his serving as a juror against another person charged with the same offence in the same indictment; and the reason is, that not charged with being under the influence of malice or favor, he stood indifferent, and competent of course to a due and impartial examination of the evidence, and faithful ascertainment of the fact on which the guilt of the party was to attach.

If the cases cited are not law, I hope the industry and talents of the honorable managers will point out in what respect and by what authority they are overruled, and if unequal to this task, that in candor they will admit them; and if such is the law, how frivolous does the exception appear. Bassett knew nothing of the author, knew nothing of Callender, never saw the publication, and had declared no opinion as to the facts; and yet in their zeal to condemn Mr. Chase, the managers disregarding these declarations of Bassett, still affect to think that the conduct of Mr. Chase was criminal, and deserving of impeachment, to let him under such circumstances serve on the jury.

To support this article, a singular ground is relied on, that Mr. Chase on the trial of Fries put this question to the jurors, "*have you formed or delivered an opinion,*" in the alternative; and in Callender's case the question was altered for special purposes, and put in this way, "*have you formed and delivered an opinion.*" I shall not even remark upon the apparent captiousness of this objection, in a great cause like the present, it only shews the desperateness of the case, and I shall rest satisfied that it is wholly immaterial whether the question was put in the disjunctive or the copulative, because the authorities prove, that had Bassett answered in the affirmative (which he did not,) it was no good cause of challenge, unless his opinion had been made up from favor or malice: which Bassett never said, which has not been attempted to be proved, and which the managers have not in any way insinuated.

But it has been contended that Bassett had made up his mind on the sedition law, and that such a work as the Prospect before Us, came within it—Granted—Who was there of any understanding or political information in Virginia, that had not made up his mind on the constitutionality or unconstitutionality of the sedition law? What man but concurred in opinion that the Prospect before Us, was a wicked, disgraceful and malignant libel? And where do the honorable managers find it a disqualification of a juror, or a cause of challenge to a juror, that he has declared an opinion as to the law? A familiar case will illustrate the fallacy of their objection. Has not every man from his infancy heard and often declared that one man to kill another with malice prepense was murder; yet this is an opinion formed and declared as to the law arising on a particular state of facts. Let us suppose a man indicted of murder, put on his trial, and when a juror came to the book, an exception was taken to such juror on the ground that he had formed and delivered an opinion on the law, because he had said the killing of a man with malice prepense was murder, would not such an exception be scouted out of courts? Is not such a man notwithstanding such opinion, competent and impartial as to hearing and weighing the evidence in the case before him? As to the *intent* with which the act was done, charged to be murder? And in what does the present case differ? Bassett thought the extracts he had seen in the newspaper came within the sedition law. He thought that law constitutional; but whether Callender was the author, whether the publication was malicious and false, and edited with intent to defame, were facts to be determined from the evidence in the cause, were facts as to which he had formed no opinion, and relative to which he had neither heard or uttered a word, and consequently was competent to an impartial decision. Here permit me again to refer to Trials Per Pais 171. where the juror had certainly formed his opinion on the law arising on the facts stated in the indictment, and yet it was held to be no cause of challenge to his trying another person on the very same indictment; but if the honorable managers do not approve of English authorities, I will refer them to the decision of chief justice Ellsworth in the state of Connecticut. See Kirby's reports, folio 427.

"As to the other point; an opinion formed *and* declared upon a general principle of law, does not disqualify a juror to sit on a case, *where that principle applies.* Jurors are judges of the law as well as of the fact, as relative to the issues put to them, and are supposed to have opinions of what the law is, though a willingness to change them, if reason appears in the course of the trial. They may all be challenged on *one side or the other, if having an opinion of the*

law in the case, is ground of challenge. It is enough in point of indifferency, that jurors have *no interest of their own affected*, and *no personal bias or prepossession, in favor or against either party*, and not requisite that they should be ignorant of the cause, or unopiniated as to the rules and principles on which it is to be decided. It has been adjudged (23. Car. K. B.) not to be a sufficient cause of challenge, that a juror had declared his opinion concerning the title of the land in question; so also that the jury have found others guilty on the same indictment; or that a juror has declared his opinion that the party is guilty, and will be hanged, if it appears he made such declaration from his knowledge of the cause, and not out of ill will to the party. 2. Hawk. p. c. 418."

This authority recognizes and adopts the English determinations: It was made by an able judge of our own courts; and is conclusive on the point.

With deference to the judgment of this court, I therefore contend, that if Baffet had objected to his serving as a juror, which I have admitted for the sake of argument, yet he disclosed no objection, which in point of law, incapacitated him from serving on the jury, and it became the duty of the court under their oath and their knowledge of the law, to see that he did serve; had they objected to him, there would have been a more colourable cause of impeachment than now exists. To serve as a juror in criminal cases, is at all times irksome and unpleasant; to do so in such a political case which greatly convulsed the public mind, was doubly so, and hence it became more strictly the duty of the court to see that none from frivolous or illegal excuses, or from motives of scrupulous delicacy should exempt themselves from the burthen, by imposing it on others. This honorable and upright discharge of duty on the part of the court, for which they merit approbation rather than censure, has been magnified, seen through an improper medium, to a charge of high crime and misdemeanor; and against so unmerited an attack the respondent reposes himself on the knowledge, integrity and impartiality of this high and honorable body, with the fullest confidence of an honorable acquittal."

If however I am too sanguine, if I am mistaken in the fact, and Baffet did object to serving on the jury, as the article charges, although Baffet himself swears he did not. If I am mistaken in the law, and the doctrine of the managers be deemed correct, in defiance of the cases cited. Yet to sustain this article of impeachment, much more is required of them. They must prove that Mr. Chase acted *corruptly;* and *with intent to oppress and procure the conviction of Callender, did overrule the objection of Baffet.*

Here let us pause. Let us bear in mind the testimony in the case; and having done so, where is the evidence to convict the respondent of having acted corruptly? Have the honorable managers named the witness? Have they pointed to the proof on which they rely? No sir, and for the best of possible reasons, because there is none to justify the charge; there is not a shadow of proof in support of it; not a hint, not an insinuation, unless it is to be found in the assertions of the honorable managers themselves, and in inferences which they draw from unsupported doctrines. I would not pay so ill a compliment to their talents as to suppose that the articles were not framed with a view to particular proofs; it is well known that exparte depositions to criminate the respondent, were taken before any one of the articles was framed; nor can I suppose seeing so many professional characters amongst the managers, that they have not adduced their strongest proof in support of each article. As therefore they have not in opening the cause condescended to point out any witness that is credible, who in any manner goes to prove that Mr. Chase acted corruptly, and with intent to oppress and procure the conviction of Callender, I call on them in reply, to satisfy the court of this fact; to satisfy their country, whose high name is used, and let the world determine between us.

Arguments indeed have been urged to this honorable court to induce a conviction of the respondent, as novel in their nature as they are dangerous in their doctrine. Some of them I shall examine. It has been laid down as a principle of law, that every man is liable to punishment who acts contrary to law, and that judge Chase having given an opinion and acted contrary to law is liable to be punished. The general principle I will readily admit, but like all other general rules it has its exceptions, and the case of a judge giving an opinion against law, forms precisely an exception to the general rule. Miserable would be the condition of a judge, if every error of judgment, was construed into corruption—called into office to determine complicated cases arising from the conflicting interests of individuals, to punish the crimes and the villainies of mankind, more cannot be required of him than that he should carry to the judgment seat talents and integrity; a clear head and a pure heart. Judges must be made of men, and from the imperfection of human nature, must be incident to its frailties—In what code are they to be deemed infallible? By what means are they to become so? And if so, then why the unnecessary establishment of appellate courts, to rectify errors of

inferior jurifdictions in all well organized governments? Why not puniſh all inferior judges on reverſal of their judgment by a ſuperior tribunal, if error be admitted as proof of corruption? If not to err, means a coincidence with public opinion, it is eaſily attained—*impeach—remove*—and when honeſt men are driven from the judgment ſeat, pliant tools will readily be found whoſe judgment ſhall conform to the will of a majority, and who will proſtrate principle to preſerve office.

An honorable manager has obſerved, that to err in ſo plain a caſe, was of itſelf evidence of corruption, and the defendant muſt be conſidered guilty, unleſs the contrary be ſhown. I did not expect this obſervation from his liberal mind; it is againſt law, and outrages all principle. In 1ſt Term Reporst, 653, Judge Bullen lays down this doctrine, "that you can never infer corruption from the judgment itſelf, but from the opinion given;" corruption is a fact of a high criminal nature, and muſt be proved not preſumed. The Engliſh authorities abound with theſe principles, and the benignity of our law is ſuch, that every man is preſumed innocent until his guilt is proved. Why ſhould this principle ſo obvious, ſo full of tenderneſs and humanity, ſo protective of life and character, be ſacrificed to gratify the impeachment againſt Mr. Chaſe; I truſt it will never be departed from, and that this honorable body in their judgment will give their ſanction to its wiſdom and humanity. They will require proof, clear and full proof.

It has been ſaid by an honorable manager, and I greatly regret an obſervation of ſuch want of liberality and correctneſs ſhould have eſcaped him, that judge Chaſe overruled the objection of Baſſet, becauſe he knew his political ſentiments; a charge of this nature ought to be well ſupported, or at once retracted. What are the facts? The reſpondent was an entire ſtranger at Richmond, had no acquaintance with Baſſet, and Mr. Baſſet ſwears that he was ſummoned as a juror in the act of diſmounting his horſe, having come to town from the country that morning; that he proceeded to court, and found the court in ſeſſion. This charge made on this ſolemn occaſion, ſo heinous in its nature, and ſo directly attacking the purity of the judge, is utterly deſtitute of every thing like evidence to ſupport it. Mr. Chaſe and Baſſet were entire ſtrangers, and from any thing that appears in teſtimony did not know of each other's exiſtence, till they met in court on the morning of the trial.

On this occaſion, the honorable managers all ſay, that the reſpondent is highly gifted, that he poſſeſſes great talents, ſound and extenſive knowlege in the law. I confeſs Mr. Preſident, I feel alarmed at their prodigality of compliment—"*timeo danaos et dona ferentes.*" His head was praiſed in order to impeach his heart. But as his talents are great to thoſe who have long known him, his integrity is not leſs. But let me unmaſk the motive of the compliment and analiſe their argument. I will endeavor to put it in a ſyllogiſtic form. Their major propoſition is, "that the defendant is a man of high legal knowlege and ſuperior talents," and in this I acquieſce heartily. The minor propoſition is, "that he has acted contrary to law by permitting Baſſet to be ſworn on the jury." This I deny; but ſuppoſing it to be correct, the concluſion they draw from the premiſes is, that poſſeſſing ſuch talents he muſt have erred corruptly, and with intent to oppreſs and procure the conviction of Callender; he could not err innocently. This with deference I ſpeak it, is a palpable *non ſequitur*, a concluſion not warranted by the premiſes, and is in direct hoſtility to known and acknowleged principles.

I would apologiſe for the time I have waſted on this article, but that I conſider it all-important to place the character of the reſpondent on high and honorable ground, and above the imputations charged in it.

Mr. Preſident—I have endeavored to ſhew that to ſuſtain the impeachment on the 2d. article, it was eſſential for the managers to prove three things; firſt the fact that Baſſet wiſhed to be excuſed from ſerving on the jury, in which they have failed entirely.

2dly. That the court erred in judgement in permitting him to ſerve, under the circumſtances, and ſcruples diſcloſed to them, and I ſubmit the law to the court.

And 3dly. That the error was a corrupt one, done with intent to oppreſs and procure the conviction of Callender; of which we have had no evidence other than the aſſertions of the honorable managers, and inferences which they have thought proper to draw.

Upon this article I have therefore the fulleſt confidence of an honorable acquittal.

I will now, Mr. Preſident, proceed to an examination of the third article of impeachment, viz.

"That with intent to oppreſs and procure the conviction of the priſoner, the evidence of John Taylor, a material witneſs on behalf of the aforeſaid Callender, was not permitted by the ſaid Samuel Chaſe to be given in, on pretence that the ſaid witneſs could not prove the truth of the whole of one of the charges contained in the indictment, although the ſaid charge embraced more than one fact."

In the opening of the impeachment it was

asked, what human ingenuity or sophistry could devise to exculpate the respondent. Sir, the conduct of the judge in relation to this article requires no ingenuity, it needs no sophistry, nothing is wanting to manifest the propriety of his decision but a clear exposition of the law. I shall endeavor to prove that the rejection of John Taylor's testimony was legal and proper, and that if the judge erred, there is no ground to suspect corrupt intentions.

The indictment against Callender contained two counts, and in each count twenty different sets of words were inserted from the Prospect Before Us, and charged as libellous. Colonel Taylor was produced as a witness and sworn, generally, on the whole case. I mean not in this stage of the argument, to consider the propriety of compelling counsel, to reduce to writing the questions to be propounded to col. Taylor; that subject will be considered under the next article of impeachment, where it constitutes a specific charge. Let it be remembered, that a few days before col. Taylor was sworn, an affidavit was made for the continuance of the cause, on the ground of material witnesses being absent. The honorable Mr. Giles and gen. Mason, of Virginia, were sworn to be material, but the name of col. Taylor does not appear in it; the trial was appointed for the second of June, when neither Mr. Giles or Mr. Mason, who were summoned, attended. The respondent offered process of attachment to compel their attendance, which the counsel for Callender declined accepting; they asked a postponement of two hours, in hopes of the arrival of Mr. Giles, when the respondent gave them until the next day; all these circumstances having passed in review before the judge. When the counsel for Callender offered to examine col. Taylor as a witness, he asked them what was intended to be proved by him; they answered they did not know, and one of the counsel declared to this honorable court, that neither Callender or his counsel, knew what col. Taylor could prove. Under these novel circumstances, of refusing to attach witnesses sworn to be material, and of offering to examine one upon speculation, not knowing what he would swear; the attention of the court must have been considerably excited, and to guard against surprise or improper testimony, the counsel were required to reduce their questions to writing, that the court might judge whether the questions and examination led to competent and legal testimony, material and proper in the cause.

The questions were reduced to writing, and to this effect:

1st. Did you ever hear Mr. Adams express any sentiments favorable to monarchy or aristocracy, and what were they?

2d. Did you ever hear Mr. Adams, while vice-president, express his disapprobation of the funding system?

3d. Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain? And the object declared to be, to prove the president to be an aristocrat, and in favor of Britain.

As to the 3d question, nothing can be more clear than that it was an improper one; it was calculated to establish by parol testimony, how a member of the senate voted on a particular occasion, whereas the fact, if material, ought to have been established by record proof; by the votes and proceedings themselves, or authenticated copies; it being an established rule of evidence, that the best the nature of the case will admit of, shall always be produced.

As to the 2d question, it had evidently no connection with any of the charges in the indictment, with any of the libellous matter alledged; therefore it was a mere and idle waste of time to suffer an answer or disclosure of circumstances, that could not extenuate, explain, or justify the publication of the traverser; and I presume it never will be urged that the court, as mere cyphers, are bound to permit counsel to examine witnesses to irrelevant matter.

The only question that can arise, is on the first, how far col. Taylor should have been permitted to disclose expressions of president Adams, to induce a belief that he was an aristocrat.

This testimony if given, could only apply to the 12th set of words, in the counts, in the indictment. Let it be remembered, that no evidence was offered to justify any other of the 19 sets of words charged as libellous. Did this testimony of col. Taylor, offer a justification of the words charged in the 12th set? If it did, then did the court err; if not, then the opinion of the court is correct. The 12th set of words are these, "*He, (meaning the president of the United States) was a professed aristocrat:*" *He (meaning the president of the United States) had proved faithful and serviceable to the British interest, (inuendo against the interest and welfare of the United States of America.")*

Surely, Mr. President, I need not state to this honorable court, that as a plea of justification must contain an answer to the whole charge laid, so where the necessity of pleading is waved and the justification may be given in evidence, that such evidence must go to the whole charge in each case, whether the matter be disclosed by plea, or given in evidence; it must, in law, be

a juſtification of a l, not of part of the charge, or the accuſed cannot be acquitted. To prove then, that preſident Adams was an ariſtocrat, was no juſtification of the libellous matter contained in the 12th ſet of words ; the term in itſelf conveys no imputation, is not libellous ; it becomes ſo by its connection with the ſubſequent words, forming an intire ſentence, which words were not attempted to be juſtified. That part of the publication that ſtates Mr. Adams to be an ariſtocrat, was inducement only to the ſubſequent libellous matter contained in the ſame ſentence ; and to admit a man to prove inducement, to prove what is immaterial, to prove a part only, and then ſet it up as a juſtification of the real libellous words, and of the whole charge, would diſgrace judicial proceedings ; and to reduce the court to the inſignificance of being compelled to receive ſuch evidence, at the will of counſel, is worſe than a mockery of juſtice. Every man of common underſtanding muſt at firſt bluſh, perceive that col. Taylor's teſtimony could not acquit the traverſer, could not juſtify his publication, and that it would have been a waſte of time, and an abuſe of the ſound diſcretion of the court, to let it go to the jury *for the purpoſes intended.*

But it is ſaid the charge contained more than one fact, and although col. Taylor could not prove all the charges, yet he ought to have been permitted to prove part, and the reſt might have been proved by other witneſſes.

To this I anſwer, that I am not defending the judge from poſſible hypothetical caſes, but on the caſe that did and does exiſt. The queſtion is not, Mr. Preſident, whether in any poſſible caſe, part of a charge ſhall be proved by one witneſs and part by another, but whether in a caſe where one witneſs is called to prove an immaterial part of a charge, and no other witneſs or teſtimony offered in the caſe, ſuch witneſs muſt be received ? This laſt is the queſtion under conſideration as growing out of Callender's caſe, for let us diſtinctly and preciſely keep in view this important fact, that no other witneſs or teſtimony was offered on the part of Callender, to ſupport his juſtification.

I certainly ſhall not deny but many caſes exiſt, where it is legal and proper to admit different witneſſes, to prove different facts or different circumſtances of the ſame fact, to acquit or convict the accuſed. Thus, a man is indicted for horſe ſtealing ; at the trial, one witneſs ſwears he ſaw the accuſed go into a ſtable with a halter in his hand ; another depoſes, that he ſaw the accuſed about the ſame time lead a horſe out of the ſame ſtable, mount him and ride off ; a third ſtates, that about an hour after, the accuſed ſold him the horſe at a place ſome few miles from the ſtable, as his own property ; a fourth proves the property, and the horſe to be ſtolen out of his ſtable. This powerful concatination of circumſtances, though each part was proved by a different witneſs, would be competent to convict.

But let us ſuppoſe that the proſecutor by one witneſs, offered to prove this iſolated fact, that the perſon accuſed was ſeen going into a ſtable with a halter in his hand, and offered no other evidence ; would the court permit ſuch evidence unaccompanied by other proof, to go to a jury to convict the accuſed ? Aſſuredly not ; and if not to convict, neither would they ſuffer ſimilar teſtimony to acquit ; for the admiſſion of teſtimony is the ſame in both.

Now I conceive this laſt caſe to be ſimilar to the trial at Richmond ; col. Taylor was called on to give evidence of one ſingle, iſolated fact, that Mr. Adams was an ariſtocrat, and no other evidence of any kind offered as a juſtification to the 12th, or the other nineteen charges. Is it poſſible to conceive that under ſuch circumſtances, col. Taylor ought to have given ſuch evidence to the jury ; it certainly was not competent to acquit, although every thing he ſaid was credible ; and of the competency of teſtimony, courts are excluſive judges ; of its credibility, the jury. Under this view of the ſubject, to me it ſeems clear, that the rejection of John Taylor's teſtimony was correct on the part of the court, and fully within their province to determine.

If in this however, I am miſtaken, let us examine if this rejection *was "with intent to oppreſs and procure the conviction of Callender,"* as charged in the 3d. article.

Here again I muſt call for proof of corrupt intent, other than that which is inferred from the erroneous opinion, if it be erroneous ; for is it not poſſible that the reſpondent might conſcientiouſly err ? Is the rejection of the teſtimony ſo flagrantly incorrect, as to evidence a depravity of heart ? Give the reſpondent credit for half the talents which the honorable managers allow him to poſſeſs, and it is impoſſible in the nature of things that in the rejection of col. Taylor's teſtimony he could have been actuated by a corrupt intent to oppreſs and procure the conviction of Callender. I hazard this aſſertion without danger of contradiction. Mr. Chaſe as a man of underſtanding, as a ſound lawyer, as an able criminal judge, having many years preſided in a criminal court of extenſive buſineſs, muſt know, he could not be ignorant, that if col. Taylor's teſtimony had juſtified the 12th ſet of words, yet as no teſtimony was offered to the other 19 ſets, Callender on them muſt of neceſſity be convicted. It became legally impoſſible to acquit him. If Mr. Chaſe is this character of high talents and de-

praved heart which he is repreſented to be, would not he have permitted col. Taylor to give evidence and ſo have ſaved himſelf from exception; have thus maſked his deſigns, and yet have had Callender completely in his power to puniſh? But how liberal and dignified was his conduct; his oath, his knowledge, his judicial integrity compelled him to declare that col. Taylor's teſtimony was inadmiſſible on *ſtrict legal principles*: yet willing to accommodate the preſſing ſolicitude of counſel, he turned to the proſecutor and requeſted him to conſent to the queſtions being propounded. "I am very much preſſed by the young gentleman to admit this teſtimony ſays the judge, and though I think it irregular, I wiſh Mr. Nelſon (the proſecutor) you would aſſent to it;" Mr. Nelſon refuſed, ſaid he was not at liberty to depart from legal principles; and yet we are ſtill told that the judge corruptly acted with intent to oppreſs and convict.

In vain do we look to the ſentence in order to diſcover an intent to oppreſs Callender? The law authoriſed in the diſcretion of the court a fine to the extent of 2000 dollars, and impriſonment not exceeding two years: and yet for a moſt flagitious and wicked, libel as profligate as ever diſgraced a preſs, the judgment was a fine of 200 dollars and nine months impriſonment. Did this evince a vindictive temper in the judge, or manifeſt ſolicitude to oppreſs?

Again Mr. Preſident, one powerful fact preſents itſelf to our view, never to be forgotten: it is this, that when Mr. Chaſe found himſelf teaſed, preſſed, almoſt perſecuted by the anxiety of Callender's counſel, he obſerved in language that ſhould have ſilenced them, "my country has made me a judge, and you muſt be governed by my opinion, though I may be miſtaken. I am a fallible man. If I am not right, it is an error in judgment, *and you can ſtate the proceedings on record, ſo as to ſhew any error, and I ſhall be the firſt man to grant you a new trial, by granting you a writ of error in the ſupreme court.*"

With a fine and impriſonment ſo moderate for ſo atrocious an offence; with a requeſt to the proſecutor to conſent to receive the teſtimony of col. Taylor; with a public declaration to the counſel, that if he was miſtaken, he himſelf wiſhed the proceedings ſtated on record, and would aſſiſt them and give them the benefit of a new trial. I ſay with theſe public and powerful demonſtrations of the purity of his conduct, what liberal and honorable mind can for a moment conceive that the judge was influenced by criminal and improper motives?

But to obviate what cannot be anſwered, the honorable managers have ſaid, that a bill of exceptions will not lie in a criminal caſe; not conceding that point in ſuch a proſecution as Callender's, permit me to ſay to this learned body, that nothing was more ſimple and eaſy, than to have ſtated the circumſtances and ſaved any one or more points of law, and afterwards have taken the opinion of the ſuperior court. The practice of ſaving points of law in criminal caſes, and taking the opinion of the twelve judges in England, is a known and familiar one; (to which the judge alluded, but which the counſel refuſed to adopt) and gave all the benefits that could flow or reſult from a bill of exceptions.

Mr. Preſident, on this article I ſhall no longer treſpaſs: I truſt I have proved that the rejection of col. Taylor's anſwers to the queſtions propoſed, was ſtrictly legal; that the court acted correctly; but if they erred, yet the conduct of the reſpondent was ſo marked with liberality and candor, his offers ſo juſt and fair, and the puniſhment inflicted ſo mild and humane, that it is impoſſible for this honorable court to find him guilty as charged in the 3d article.

Mr. Preſident, with the indulgence of the court I will now proceed to examine the fourth article of impeachment:

"That the conduct of the ſaid Samuel Chaſe was marked, during the whole courſe of the ſaid trial, by manifeſt injuſtice, partiality and intemperance, viz.

1. In compelling the priſoner's counſel to reduce to writing, and ſubmit to the inſpection of the court, for their admiſſion or rejection, all queſtions which the ſaid counſel meant to propound to the above named John Taylor, the witneſs.

2. In refuſing to poſtpone the trial, although an affidavit was regularly filed, ſtating the abſence of material witneſſes on behalf of the accuſed; and although it was manifeſt, that, with the utmoſt diligence, the attendance of ſuch witneſſes could not have been procured, at that term.

3. In the uſe of unuſual, rude, and contemptuous expreſſions towards the priſoner's counſel; and in falſely inſinuating that they wiſhed to excite the public fears and indignation and to produce that inſubordination to law, to which the conduct of the judge did, at the ſame time, manifeſtly tend:

4. In repeated and vexatious interruptions of the ſaid counſel, on the part of the ſaid judge, which, at length, induced them to abandon their cauſe and their client, who was thereupon convicted and condemned to fine and impriſonment:

5. In an indecent ſolicitude, manifeſted by the ſaid Samuel Chaſe, for the conviction of the accuſed, unbecoming even a public proſecutor,

but highly disgraceful to the character of a judge as it was subversive of justice."

I understand the five specifications following the article, to contain the particular instances or facts on which they rely, to establish the allegations of manifest injustice, partiality and intemperance.

The first specification is, that of compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court for rejection or admission, all questions meant to be propounded to col. Taylor. I am at a loss to discover what *injustice* could result to Callender from this procedure; nor do I observe in such conduct any symptoms of *partiality*, much less any thing resembling *intemperance*—the three matters charged in the article as criminal and impeachable.

It is contended that such an exercise of authority was arbitrary and oppressive, new and unusual in Virginia. That it was novel in Virginia, I admit, but it does not therefore follow that it was impeachable and criminal; I know well that different practices prevail in different states, but the practice is to be tested by its reason and propriety. I have, in a former part of my argument, shewn under what singular circumstances col. Taylor was produced as a witness; circumstances that, exciting the attention of the court, would necessarily lead them to enquire, what was meant to be proved by col. Taylor; and as the power of a court to determine upon the competency of testimony, and whether it shall be permitted to go to the jury or not, is an axiom in law no where disputed, it follows necessarily from this power, that they have a right to hear and know the question to be put which is calculated to draw forth the evidence; and it is every day's practice in all courts to object to, and take the opinion of the court, on the propriety of putting a particular question to a witness, and surely to have this question reduced to writing that its bearing tendency and effect may be more clearly known and understood, can never be criminal. It seems to me to be the most querulous and captious objection imaginable. But is this practice so novel in courts as it is represented to be? For one of the witnesses, a professional gentleman in high office in Virginia, stated that he had never seen, heard, or read, of such a practice. In Maryland it is familiar, as every professional character from that state, who hears me, knows. It is the practice of the supreme court of the United States, it was used on an occasion of much notoriety, the mandamus cause. Not a question there was put or allowed to be put, until reduced to writing; nay more, the late attorney general of the United States, who hesitated whether he would answer or not, took the questions, when reduced to writing, home with him, to determine by the next day whether he would or would not answer them. Here was a far higher exercise of the power, yet no person, however distorted his imagination, ever conceived it to be *unjust*, *partial*, or *intemperate*. What, Mr. President, is the usage of this high and honorable court in similar cases? Not a question has been doubted as proper by the counsel on either side, or by any honorable member of the court; but the president, by the instantaneous impulse of sound reason, or an extensive and familiar knowledge of law and of practice, has ordered the question to be reduced to writing, by those propounding it; such then is the practice of this court in this very trial. Such has been the practice of the supreme court, and such the usage of Maryland, where the respondent has lived and acquired his knowledge of the law; thus supported by reason and sanctioned by precedent, I hope we shall never again hear, that any criminality attaches to the same conduct in Virginia.

The 2d specification is grounded on the fact of "refusing to postpone the trial, although an affidavit was regularly filed, &c." Mr. President, the 6th article of impeachment is predicated on the judge having ordered a trial, at the term when the indictment was found, contrary to an express law of Virginia. To me it seems astonishing, if any such statutary provision exists, that it was not produced to the court, read to the court, and a postponement *demanded*, as a *matter of right*. Either the counsel had no recollection of such law, which cannot be supposed, as one of them was attorney general of the commonwealth, or they thought it inapplicable, and therefore resorted to common law principles, to an affidavit for continuance. An application to the court for the continuance of a cause on affidavit, is always an application to the discretion of the court; by discretion, I do not mean arbitrary will and pleasure, but a sound, rational discretion, exercised for the furtherance of justice under the circumstances disclosed. The great object of criminal jurisprudence is, that trials for offences shall speedily take place, and punishments be lenient but certain. In Maryland, where the respondent with great honor to himself and benefit to the public, had long presided in a criminal court, offences are always tried the same term at which the indictment is found, as a matter of course, unless legal cause be shewn on affidavit. In Callender's case a general affidavit was first filed, but on being suggested to the court, leave was given to prepare a full and special one by the next day; a second affidavit was then filed and a motion grounded on it for continuance of the cause. Every affidavit for the continuance of a cause, must designate the witnesses

wanted, where they reſide, and the extent and nature of their teſtimony. The firſt is required that they may be known in order that the neceſſary proceſs may iſſue againſt them. The ſecond, to diſcover if they are within reach of the proceſs of the court, for commiſſions to take teſtimony never iſſue on criminal proſecutions. The third, that the court may judge of the teſtimony wanted, is relevant, and goes to the defence and juſtification of the accuſed; and that the oppoſite party may admit ſuch teſtimony and proceed to trial, for it is obvious, that if the teſtimony wanted, is admitted, there can be no legal ground to poſtpone or continue the cauſe. It is alſo eſſential that the extent and nature of the teſtimony wanted ſhould be diſcloſed, leſt frivolous and trifling matter, unimportant to the juſtification of the accuſed, ſhould lay the foundation for defeating criminal juſtice. The affidavit muſt diſcloſe facts which, if proved, would exculpate the accuſed, and of this the court muſt judge. Without this power and diſcretion in the court, criminals could never be tried; if as has been ſaid in argument, on application for continuance on affidavit, the teſtimony need not be diſcloſed; it would produce this monſtrous abſurdity, that the trial of the criminal might forever depend on himſelf and not the court, for ſo long as he would ſwear that he had material and competent witneſſes who were abſent, (and he himſelf was to judge of their materiality and competency) he never could be tried. A doctrine too prepoſterous to be maintained. If the affidavit is to diſcloſe the materiality of the teſtimony to the court, for them to judge of, it muſt diſcloſe matter that would amount to a full juſtification, to a full defence of what the accuſed was charged with, or the court would not continue the cauſe; for inſtance, a man is indicted for ſtealing a horſe, ſaddle, and whip, and when put to his trial, makes an affidavit that a witneſs reſiding in another ſtate, is a material and competent witneſs, and that he can prove the whip belonged to the accuſed, and therefore demands a continuance. Sir, if any court of criminal juriſdiction, could be weak enough to fruſtrate the ends of juſtice by continuing ſuch a caſe, on ſuch an affidavit, they would almoſt deſerve to be impeached. And yet, Mr. Preſident, the caſe put is not more glaringly improper to be continued, than was Callender's on his affidavit.

The indictment againſt Callender, ſtated twenty diſtinct ſets of libellous words taken from "The Proſpect Before Us." In that work, and in the indictment are found theſe approbrious and degrading expreſſions: "*That John Adams, (the preſident) was a hoary headed incendiary:*" "*That John Adams, (the preſident) his hands were reeking with the blood of the poor friendleſs Connecticut ſailor.*" This honorable court by turning to the affidavit filed for a continuance of the cauſe, will perceive, that ſunk as Callender was in infamy, he could not attempt, he dare not deſignate a witneſs to ſupport thoſe charges againſt that venerable patriot, whoſe fair fame was ſo malignantly aſſailed. And yet although he attempted no juſtification of theſe expreſſions; ſtated no teſtimony that applied to them; he demanded a continuance of his cauſe, and the court have been abuſed proſecuted and impeached for not granting it. To ſuch charges as he did not or could not juſtify, or offer evidence to juſtify, he ſhould have plead guilty, or have gone to trial. To plead guilty would not anſwer his views, to go to trial was uſeleſs, for he had ſuggeſted no teſtimony that could defend his calling Mr. Adams a hoary headed incendiary, and that his hands were reeking with the blood of the Connecticut ſailor. In this labyrinth of difficulties, an ingenious attempt was made for a continuance, and the reſult was, an affidavit diſcloſing witneſſes who, if preſent, could not ſave him, by *his own* ſtatement of what they would prove, in the fulleſt extent of what it is ſtated they would ſwear. Had they been preſent, this honorable court will perceive, that he muſt have been convicted on more than half the charges in the indictment.

In what does this caſe ſtand fairer for continuance, than the one put of the poor felon, who, by proving the whip to be his own, did not wiſh to be tried for ſtealing the horſe and ſaddle? Is it becauſe Callender was a libeller? Of all men living, in the whole round of accuſed criminals; none leſs deſerve continuances, none are leſs entitled to it than libellers. He, who from malice or money ſlanders reputations and deals in calumny, ſhould at all times be previouſly prepared to prove what he has had the audacity to advance. But ſtill Callender was entitled to the benefit of the law, and had he exhibited an affidavit that was full and proper, the court would have granted a continuance; the affidavit filed would not juſtify the court in ſo doing; it was eſſentially defective in this, that it did not ſtate material and competent teſtimony abſent, which if preſent, would amount to a full defence and juſtification of the charges in the indictment. There are other grounds on which to ſhew this affidavit was defective, but as the anſwer of the reſpondent is in poſſeſſion of the court, and is luminouſly ſtrong on this ſubject, I ſhall add but little more.

The affidavit ſtated the witneſſes to be at the remote ends of the continent; it did not ſtate a belief that they could be obtained in any reaſonable and definite time; in truth it was a ſhallow pretext for delay; *the witneſſes were not wanted.* Am I juſtified in ſaying ſo? Mr. Giles and Mr. Maſon were ſworn to be material. They were ſummoned, but not compelled

to attend, although the court offered compulsory proceſs againſt them. The counſel have declared they meant to defend Callender on the unconſtitutionality of the law; witneſſes were certainly not wanting for that point. If the honorable Mr. Giles and Mr. Maſon were material, as they were ſwore to be, as they had been ſummoned and did not attend, how repugnant to all uſual proceedings was the conduct of counſel in not attaching them. Where is the clue to this myſterious conduct? It is to be found, Mr. Preſident, in the acknowlegment of Mr. Hay himſelf, that it was the cauſe, not the man, he defended; and that he was unwilling it ſhould be tried before Mr. Chaſe. He had heard of his conduct on the trial of Fries, and diſliked him. When the judge offered a poſtponement of ſix weeks, *or more*, to obtain their teſtimony, the propoſition was rejected; and why? Becauſe judge Chaſe was ſtill to preſide at the trial. Such was the averſion to him, that nothing ſhort of another term and another judge would gratify them. With this full and diſtinct view of the object of Callender's counſel, drawn from their own acknowledgement, and with a clear perception of the points in which the affidavit was defective, it is impoſſible to miſtake the law, it is impoſſible to believe otherwiſe than that the court were juſtified in the refuſal to continue the caſe on the affidavit filed, no perſon can ſay that in ſo doing, the conduct of the court was marked by injuſtice, partiality and intemperance, as charged in the article.

It was urged by the managers, that even the harſhneſs of the criminal code in England allows time to ſummons witneſſes, and Forſter's reports were cited to that effect. The court in Forſter, ſat under a ſpecial commiſſion, and but 14 days were allowed the criminals to obtain their witneſſes from the remote parts of England and Scotland. In this caſe, Mr. Chaſe offered a poſtponement of ſix weeks, it was rejected; from this offer it is a fair concluſion to ſay, that longer time would have been granted, if aſked, but no time would anſwer, no time would ſuit, if *he* was to preſide. To defeat the effect of this offer on the part of the court, it has been fairly ſuggeſted, that the court have no power to poſtpone their ſeſſion and meet again. To an objection like this, I make no other anſwer than the frequent exerciſe of the power as proved in evidence, and the abſolute neceſſity of the exiſtence of ſuch power in all courts not ſpecially reſtricted to meet numerous contingencies which would otherwiſe defeat the adminiſtration of juſtice.

To the third ſpecification. "In the uſe of unuſual, rude, and contemptuous expreſſions towards the priſoner's counſel; and in falſely inſinuating that they wiſhed to excite the public fears and indignation and to produce that inſubordination to law, to which the conduct of the judge did, at the ſame time, manifeſtly tend." I ſcarcely know what part of the teſtimony applies; the hon. managers give weight to it, but do not collect and ſtate the teſtimony in ſupport of it; one of them has indeed ſaid, the judge called the counſel *boys*, but I have heard this term from none but the honorable manager. The witneſſes ſay he called them *young gentlemen*, a term certainly not rude or contemptuous, and moſt probably ariſing, as he was a ſtranger, from not immediately recollecting their names, and was in my judgement full as decorous, as calling them by name.

It is true the judge did ſay that the argument uſed by one of the counſel, *was a popular one, calculated to deceive and miſlead;* and never was an expreſſion more correctly true. Mr. Hay in his laſt examination ſtates, that it was the cauſe, and not the man he was defending, and ſure I am, as a man, Callender was a character too profligate for that gentleman to be intereſted in his behalf. He added, that he had no hopes *of getting him clear on the facts;* that he had little hopes of convincing judge Chaſe, or *any other federal judge* of the unconſtitutionality of the ſedition law, but he had ſome faint hopes with the jury, and that his chief object was to make an impreſſion on the bye-ſtanders. When the judge determined that the unconſtitutionality of the law ſhould not be argued to the jury, the hopes of counſel ceaſed, he could not convince the jury nor make an impreſſion on the bye-ſtanders, and of courſe withdrew from the cauſe. With this candid declaration of his objects, was the judge correct in ſaying the argument was meant to be a popular one, and calculated to deceive and miſlead? And was truth offenſive becauſe it came from the bench?

Could Mr. Chaſe, who for near fifty years has been at the bar and on the bench, of great acknowledged talents, be ignorant of the aim and object of counſel? And with his mind made up as to the conſtitutionality of the law, was he to ſit a cypher to ſee the jury miſled, and the bye-ſtanders, and not the court addreſſed. The very object was diſreſpectful to the authority of the court, and with becoming dignity he ſtopped the counſel, in language ſuited to the occaſion which gave it birth. Judge Marſhall ſaw nothing particular and offenſive in the court. Mr. E. Randolph ſaw nothing in the court evidencing a diſpoſition to oppreſs Callender. Col. Taylor obſerved, that the conduct of the judge was imperious, ſarcaſtic and witty, and another witneſs obſerved, that he was extremely facetious, but none of them have ſaid he was rude contemptuous or oppreſſive.

As to the fourth ſpecification Mr. Preſident, "In repeated and vexatious interruptions of the ſaid counſel, on the part of ſaid judge, which, at length, induced them to abandon their cauſe and their client, who was thereupon convicted and condemned to fine and impriſonment," I ſhall make very few remarks. A judge has the unqueſtioned right to ſtop or interrupt counſel at any time in any miſtatement of the fact or the law. In order to prove the unuſual frequency of Mr. Chaſe's interruptions, a queſtion was aſked Mr. William Marſhall, clerk of the court, if he had ever witneſſed ſo many in any one trial, he anſwered he had ſeen more in a caſe before judge Iredell. If the counſel had behaved with more politeneſs to the court, the interruptions would have been leſs frequent. Mr. Hay acknowledges he had received unfavorable accounts of Mr. Chaſe before he came to Richmond. One of the witneſſes ſays he appeared in irritation during the trial, and chief juſtice Marſhall ſays the irritation began with the trial and increaſed with the progreſs of the cauſe. In one inſtance the court interrupted counſel, and ſaid the motion was a wild or miſtaken one. It was when counſel obſerved that the law of Virginia was to be the rule of deciſion in the federal court, and the jury were to aſſeſs the fine. By the law of Virginia, I underſtand the jury may fine *ad libitum*, by the act of congreſs the fine is limited to 2000 dollars, and under the ſtatutes of the United States, fines are always impoſed by the courts. Well might the court ſay ſuch a motion was a wild one. It is in evidence to this honorable body, that twice before at Richmond, in the ſame court, the ſame point had been determined, once by judge Wilſon and once by judge Iredell.

Sir, the 3d and 4th ſpecifications ſeem deſigned to deſignate the lines of civility between the bench and bar, and to eſtabliſh certain rules for decorous behavior in their intercourſe; and were we trying the judge for violating ſuch rules, our time might not be miſapplied. Poliſhed manners, ſuavity of diſpoſition, and decorous behavior, give grace and elegance to men in all offices and ſituations; but on the bench we ſhould be ſatisfied with ſound knowledge, inflexible integrity, and firmneſs of opinion. When or where was the want of decorous behavior to counſel deemed an impeachable offence in a judge. What ſtatutary, proviſion, or known rule is violated, what legal or moral duty broken.

The 5th ſpecification contains a charge of "indecent ſolicitude manifeſted by the judge." It is as general as the term intemperance uſed in the article; to which, as the reſpondent is happily not addicted to the free uſe of ſpirits, I can with difficulty attach a preciſe opinion. I know not the meaning of it as uſed in the article, nor has any argument yet been able to throw any light on it.

Solicitude is an operation of the mind—it means mental anxiety. A judge cannot be deemed guilty of a crime for feeling a ſolicitude that guilt ſhould be puniſhed, or innocence acquitted. If the diſpoſition of his mind does not break out into ſome overt act that is criminal, he cannot be puniſhed. I really am at a loſs to know why this term was introduced, unleſs to let in the teſtimony which I ſhall proceed to examine.

It is ſaid that before the trial the judge manifeſted a determination to convict Callender; and in ſupport of this, his jocular converſations have been brought forward as proof of his intent.

The firſt converſation is the one with Mr. Maſon at Annapolis. When Mr. Chaſe had finiſhed his addreſs to the jury, Mr. Maſon of pleaſant and facetious habits himſelf, came forward to the judge, and introduced the converſation, and aſked the judge whether his charge was political, legal, moral or religious; to which the judge pleaſantly replied, he believed it was a little of all. The converſation turned on Virginia and Callender, and the ſportive jocular obſervations of the judge are converted into evidence of guilty intention. Mr. Maſon admits the converſation was jocular—Judge Wincheſter his aſſociate, ſo underſtood it. It is ſo inconſiſtent with the admitted good ſenſe of the judges, that he ſhould diſcloſe ſuch guilty intentions in a public converſation in a public court room, that none can believe him ſerious—and it is ſo repugnant to our feelings that a converſation of ſuch a nature ſhould be tortured into proof, that I ſhall forbear further remarks on it.

The next evidence that is offered is diſcloſed by a fellow traveller in a public ſtage, where his public converſation is again brought forward to criminate him. It is in the recollection of the court and at this late hour I ſhall not dwell on it: it cannot operate againſt him: but there is one witneſs who if he has ſworn the truth, goes directly to impeach the integrity of the judge; it is Mr. Heath, who ſwears that he was in the room with judge Chaſe at Richmond when Mr. Randolph, the marſhal came in: the ſubſtance of what he depoſes is, that Mr. Chaſe aſked the marſhal what he had in his hand; he anſwered, the pannel of the jury to try Callender; the judge aſked if he had any of thoſe creatures called Democrats on the jury, that they muſt be ſtruck off: that the marſhal anſwered, "he never diſcriminated"—ſays the judge, look over it, and if any, ſtrike them off.

He further depoſed that he never was in the judge's chambers, *but on that one occaſion.*

Mr Preſident, I ſhall certainly not ſay to this honorable body, that Mr. Heath in giving teſtimony has wilfully ſworn to what was falſe, it is not my habit to accuſe men of ſuch high offences; but I will demonſtrate, that he is groſsly miſtaken, and that his teſtimony is untrue.

He ſays he never was in the judges chambers but once. Mr. Marſhall, clerk of the court, ſtates, that from civility to Mr. Chaſe, who was a ſtranger in Richmond, he uſually called on and attended him to court. That he called one morning, and found the witneſs Heath in the room, or in the act of leaving the room, and he heard no ſuch converſation. He ſays to the beſt of his recollection Mr. Randolph (the marſhal) went to Mr. Chaſe's room with him, but of this he is not ſure: he remembers perfectly that Mr. Chaſe, the marſhal and himſelf, went to court together the ſame morning; from this circumſtance, that he expreſſed his ſurpriſe to Mr. Randolph at ſeeing Mr. Chaſe and Heath together, wondering as Mr. Chaſe was a ſtranger, how they got acquainted. Mr. Randolph the marſhal, ſwears, that no ſuch converſation, as Heath ſtates, ever did paſs between Mr. Chaſe and himſelf: that he never did ſhew to judge Chaſe or to any judge or any panel of a jury, except in court when he preſented the grand jury panel to ſelect a foreman.

He poſitively ſwears no ſuch converſation did or could take place, becauſe no panel to try Callender was ever made out, until after the court met on the day Callender was tried—that the panel was made out in court, from the names given to him in court by his deputies, and that ſeveral of the jurors were not ſummoned until the morning of the trial.

The high reſpectability and credit of Mr. Marſhall and Mr. Randolph I need not notice to the court, except for the very great compliment to the veracity and integrity of Mr. Randolph, handſomely paid by Mr. Hay. When the latter gentleman was examined as to his recollection of a converſation ſtated by Mr. Randolph, he ſaid he did not recollect it, but as Mr. Randolph had ſaid ſo, he had therefore no doubt of it—he was a man of ſuch high character.

Theſe two witneſſes (Mr. Marſhall and Randolph) flatly and poſitively contradict Heath, and falſify his teſtimony; and as further proof that the panel of the jurors never was made out till after court met, we may call to mind what Baſſet ſwears, that he came to town from the country the morning of the trial, and was ſummoned as a juror to try Callender after court ſat, and in the act of diſmounting from his horſe. In charity to Mr. Heath's memory I wiſh he had not been ſworn. What he did depoſe, is proved to be falſe, expreſsly and pointedly, by characters above all exception, and by facts that are utterly inconſiſtent with what Heath ſtates as to the panel.

This maſs of teſtimony ſo much relied on, to prove Mr. Chaſe's indecent ſolicitude to convict Callender, terminates, on examination, in a jocular converſation in a public room; an unimportant remark in a public ſtage; and the diſcrediting a witneſs, who to ſpeak of him moſt reſpectfully, we are compelled to ſay was groſsly miſtaken.

With ſubmiſſion to the honorable managers, I muſt be permitted to ſay, that the ſpecifications to ſuſtain the 4th article of impeachment are wholly incompetent to it—many are frivolous, none are ſuſtained; and that there is no evidence that Mr. Chaſe during the trial conducted himſelf with manifeſt injuſtice, partiality and intemperance.

Mr. Preſident, the real conduct of the judge on the trial of Callender, teſted by the proof before this honorable body, and diveſting ourſelves of all prejudice or partiality, was correct, manly and liberal; of an ardent mind and ſanguine habit, that he might have evidenced more warmth than weaker heads and colder conſtitutions, I readily admit; but that it was at any time beyond what the occaſion called for, remains yet to be proved; and that it ever over-ſtepped the boundaries of law and juſtice, I utterly deny.

In the courſe of my obſervations, I have ſpoken of Mr. Chaſe only—in ſo doing, this honorable body will not for a moment ſuppoſe, I mean the ſlighteſt diſreſpect to judge Griffin—It is in proof that Mr. Chaſe conſulted him, and that he concured in thoſe points, where concurrence was neceſſary. Of the talents and integrity of that gentleman, I have too high an opinion, to believe he was the weak or ready tool of Mr. Chaſe, and overborne by his rudeneſs and temper. No, ſir; however neceſſary it may be to ſupport the impeachment by giving falſe colorings to the characters of the aſſociate judges, in order to heighten the enormities of Mr. Chaſe, I am under no ſuch obligation. I have no doubt his aſſociates were honorable, learned and upright men, every way independent and competent to the diſcharge of the high truſts conſided to them: but as Mr. Chaſe has been ſingled out from his brethren, I have uſed his name and that of the court as ſynonimous for the ſake of brevity and ſimplicity. In ſo doing I have had no other object.

Amidſt the preſſure of other engagements, I

have had no time to digeſt an argument, and have ſcarcely been able to make myſelf heard from the ſeverity of my indiſpoſition. Such as my obſervations are, they are at the ſervice of the reſpondent; and I make my reſpectful acknowledgments to this honorable body and to the preſident in particular, for the attention and indulgence with which I have been honored through ſuch a length of time.

Mr. LEE,

May it pleaſe this honorable court.

We are now arrived Mr. Preſident in the courſe of the defence, to the fifth article of impeachment. I have, ſir, been led to believe, that the preſent proſecution is brought before this honorable court as a court of criminal juriſdiction, and that this high court is bound by the ſame rules of evidence, the ſame legal ideas of crime, and the ſame principles of diciſion which are obſerved in the ordinary tribunals of criminal juriſdiction. The articles themſelves ſeem to have been drawn in conformity to this opinion, for they all except the fifth, charge in expreſs terms ſome criminal intention upon the reſpondent. This doctrine relative to impeachment, is laid down in 4 Black 259, and in 2 Woodeſon 611. "As to the trial itſelf it muſt of courſe vary in external ceremony, but differs not in eſſentials from criminal proſecutions before inferior courts. The ſame rules of evidence, the ſame legal notions of crimes and puniſhments prevail. For impeachments are not framed to alter the law, but to carry it into more effectual execution where it might be obſtructed by the influence of too powerful delinquents, or not eaſily diſcerned in the ordinary courſe of juriſdiction by reaſon of the peculiar quality of the alledged crimes. The judgement therefore is to be ſuch as is warranted by legal principles and precedents." The conſtitution of the United States appears to conſider the ſubject in the ſame light. By the third ſection of the third article, "the trial of all crimes except in caſes of impeachments, ſhall be by jury," and by the fourth ſection of the ſecond article, the nature and extent of the puniſhment in caſes of impeachment is defined. Hence it may be infered that a perſon is only impeachable for ſome criminal offence. With this view I have examined and re-examined the fifth article of impeachment to know againſt what the defence ſhould be made. Looking at it with a legal eye, I find no offence charged to have been committed, and although it may ſeem ſtrange it is not the leſs true this circumſtance has produced the greateſt difficulty and embarraſſment in what manner the defence ſhould be made.

That this honorable court may perceive that I have not miſapprehended the article, I will pray leave to read it. "And whereas it is provided by the act of congreſs paſſed on the twenty-fourth day of September, one thouſand ſeven hundred and eighty-nine, intituled "An act to eſtabliſh the judicial courts of the United States," that for any crime, or offence againſt the United States, the offender may be arreſted, impriſoned, or bailed, agreeably to the uſual mode of proceſs in the ſtate where ſuch offender may be found; and whereas it is provided by the laws of Virginia, that, upon preſentment by any grand jury of an offence not capital, the court ſhall order the clerk to iſſue a ſummons againſt the perſon, or perſons offending, to appear and anſwer ſuch preſentment at the next court; yet the ſaid Samuel Chaſe did at the court aforeſaid, award a capias againſt the body of the ſaid James Thompſon Callender, indicted for an offence not capital, whereupon the ſaid Callender was arreſted and committed to cloſe cuſtody, contrary to law in that caſe made and provided."

This article charges no evil intention, no offence, no crime, yet the reſpondent is required to make a defence and is to addreſs his defence to this court as one of criminal juriſdiction.

I do not mean to produce authorities to this high and learned tribunal to ſhew that a judge cannot be impeached for a mere error of judgment in any inſtance of his judicial conduct. I wiſh for none better than thoſe produced by one of the honorable managers of the proſecution (Mr. Clarke) to prove this poſition 2 Bacon 97, and Jacob's Law Dictionary, Title Judges. The elegant advocate juſt ſat down (Mr. Key) has fully eſtabliſhed the ſame doctrine. If then this be admitted, where or what is the crime charged in the fifth article. The whole charge is, that by authority of the judge, a proceſs called a capias was awarded againſt Callender, when that proceſs ought to have been a ſummons. It is not alledged that the capias was awarded with any corrupt or evil intention of any kind. If then the article contains no charge of a crime, there muſt be an acquittal. Upon this point I hope I may be permitted to remind the court of an obſervation of another of the honorable managers who opened the comments upon the evidence for the proſecution (Mr. Early). He ſtated, and he ſtated truly as a general rule of juriſprudence, that if there be no evil intention ſet forth in the charge and proved the party accuſed muſt be acquitted. With theſe remarks if this was an ordinary caſe before an ordinary tribunal, I might diſmiſs this part of the accuſation, and it may ſeem ſcarcely proper to occupy the precious time of this honorable court ſo

near the close of its session, in defending the respondent any further against such a charge, but I feel too much respect for the house of representatives who have preferred this article, and for the honorable managers who support it not to give it a fuller investigation.

The article may perhaps be understood to produce an important enquiry: the enquiry how far the power of impeachment possessed by the house of representatives shall extend. Although the constitution declares that "the house of representatives shall have the sole power of impeachment," yet I trust there is some limit to this power, and that a judge cannot be impeached for a mere legal error in his judicial conduct when no crime is imputed to him. An impeachment is an accusation of a most serious nature, and the people of the United States have not vested the power of impeachment exclusively in the house of representatives in congress, but in their state governments they have established tribunals who are too possess the power of impeachment. I hold in my hand a little book which contains the most valuable matter; it contains the constitutions of the several states. By referring to them we find in almost every instance, that a power of impeachment may be exercised under the state authority. When, therefore, the doctrine of impeachment is about to be fixed in regard to the limits of the power of impeachment by a judgment of this high and honorable court, a judgment is about to be given that will be a precedent for the tribunals of the different states. An example is about to be set to the tribunals of the several states, that will influence and direct their decision in the construction of their constitutions relative to the power of impeachment. The words used in some of these instruments are the same, and in others nearly the same with the words in the constitution of the United States, upon this subject.

Is there not some limit to the power of impeachment, a power which we find can be exercised by so many authorities in this country? If there is a limit, what better limit can be set than that of high crime and misdemeanor in office, as appears by the language of the constitution to have been intended.

Let us now examine whether judge Chase in issuing a capias against Callender after he had been presented for an offence not capital has been guilty of a high crime or high misdemeanor in office. Surely the managers should have pointed to the proofs, if any there were, of a corrupt and evil intent with which this act was done. I have already referred to those parts of the constitution which shew that no impeachment can be maintained but for a crime. If the court will turn their attention to the article now under consideration, they will perceive that no crime is charged in express terms, and therefore the accused ought not be held to answer it; but an idea has been suggested by the honorable managers, that as the article charges an unlawful act to have been done, a criminal intention must be presumed, unless the respondent shews it to have been innocent. This principle however true it may be in some cases, is not applicable to the present case. If the act charged be *malum in se*, the rule of law may be as has been stated, but if the act be malum prohibitum, the rule is otherwise.

In order that the honorable court may not have the least difficulty on this subject, I will undertake to shew that the learned judge acted in this instance strictly according to law, and if this be shewn, there will remain no foundation for the present charge.

It is well established as a general rule of jurisprudence, that a court which has jurisdiction over an offence, may award process concerning it, and compel the party to appear. This may be seen in 2. Hawk, pleas ch. 13, sec. 15 16. The cognisance of offences against the statutes of congress is vested in the circuit courts of the United States. 1. vol. Laws of U. S. page 55. From the principle just stated, the circuit court acquired the power of awarding process to compel such offenders to appear in that court when they became vested with a power to try the offence. A presentment or indictment of a grand jury is sufficient evidence to authorise the court to award process against the offender. This is not only the evidence upon which a court usually proceeds, but it is recognised in the fifth article of the amendments to the constitution. We find there a restriction upon the power of the courts; "no person shall be held to answer for a capital or other infamous crime, unless by a presentment or indictment of a grand jury," &c. which restriction carries the implication, that by a presentment or indictment, the party shall be held to answer. If an offender may be held to answer to an accusation in this form, it follows as a matter of course, that the court is bound to award process to compel him to answer.

I know no process by which a person can be apprehended except by a capias. In the present trial we have heard of a bench warrant, but that too is a capias awarded by a judge setting in court. In all cases of misdemeanors where the punishment is by imprisonment or fine, a capias is proper process, according to the practice of the king's bench in England. For this I refer the court to a passage read at another day from Gilbert's Treatise upon the origin of the king's bench, page 308. So also the doc-

trine is laid down by judge Blackſtone, in regard to thoſe caſes where it is not intended to proceed to outlawry. 4th. Black. Com. 319.

A capias therefore in the caſe of Callender, was the proper proceſs, according to common law principles, and the Engliſh authorities of modern date. In reaſon and common ſenſe, a capias is the proper proceſs where the offence is puniſhable by impriſonment, and we all know that Callender was charged with an offence puniſhable by fine and impriſonment.—In ſuch a caſe, a ſummons would be a notification to the offender to abſcond or remove himſelf out of the reach of the court.

If any doubt can yet remain as to the propriety of iſſuing the capias, it will be entirely removed by attending the laws of the United States. The 14th. ſec. of the "act to eſtabliſh the judicial courts of the United States," gives power to the circuit courts, to *iſſue all writs neceſſary for the exerciſe of their juriſdiction, and agreeable to the principles and uſage of law*, and the 11th. ſec. of the ſame act, gives excluſive cogniſance of all crimes and offences cogniſable under the authority of the United States to the circuit courts, except otherwiſe directed by that or ſome other ſtatute. The court which awards the writ, is to decide what proceſs is neceſſary for the exerciſe of its juriſdiction, and agreeable to the principles and uſage of law in each particular caſe.

The 33d. ſec. of the ſame ſtatute contains a great deal of important matter in regard to the preſent enquiry. "That for any crime or offence againſt the United States, the offender may, by any juſtice or judge of the United States, or by any juſtice of the peace, or other magiſtrate of any of the United States where he may be found, agreeably to the uſual mode of proceſs againſt offenders in ſuch ſtate, and at the expence of the United States, be arreſted, and impriſoned or bailed, as the caſe may be, for trial before ſuch court of the United States as by this act has cogniſance of the offence: And copies of the proceſs ſhall be returned as ſpeedily as may be into the clerk's office of ſuch court, together with the recogniſances of the witneſſes for their appearance to teſtify in the caſe; which recogniſances the magiſtrate before whom the examination ſhall be, may require on pain of impriſonment. And if ſuch commitment of the offender, or the witneſſes ſhall be in a diſtrict other than that in which the offence is to be tried, it ſhall be the duty of the judge of that diſtrict where the delinquent is impriſoned, ſeaſonably to iſſue, and of the marſhal of the ſame diſtrict to execute a warrant for the removal of the offender, and the witneſſes or either of them as the caſe may be, to the diſtrict in which the trial is to be had. And upon all arreſts in criminal caſes, bail ſhall be admitted, except where the puniſhment may be death, in which caſes it ſhall not be admitted but by the ſupreme or a circuit court, or by a juſtice of the ſupreme court, or a judge of the diſtrict court, who ſhall exerciſe their diſcretion therein, regarding the nature and circumſtances of the offence, and of the evidence and the uſages of law. And if a perſon committed by a juſtice of the ſupreme or a judge of a diſtrict court for an offence not puniſhable with death, ſhall afterwards procure bail, and there be no judge of the United States, in the diſtrict to take the ſame, it may be taken by any judge of the ſupreme, or ſuperior court of law of ſuch ſtate."

Here it is expreſsly authoriſed that a judge of the circuit court may order a proceſs for the *arreſt* of the accuſed for any crime or offence againſt the United States, agreeably to the uſual mode of proceſs of arreſt againſt offenders in the ſtate where the court is holden, and the offence committed. A ſummons is not authoriſed by the ſection, becauſe a ſummons is not a proceſs of *arreſt*. I call upon the learned managers to point out any other proceſs by which a perſon can be arreſted, even in Virginia, except by a capias. In England, in Virginia, in Maryland, in every ſtate, the proceſs of *arreſt* is by capias.

There is another ſtatute of congreſs on the ſubject of proceſs, which paſſed on the ſecond of March, 1793. It contains eight ſections, and relates as well to *criminal* as *civil* matters. The ſeventh ſection is in the words following, "that it ſhall be lawful for the ſeveral courts of the United States, from time to time, as occaſion may require, to make rules and orders for their reſpective courts, directing the returning of writs and proceſſes, the filing of declarations and other pleadings, the taking of rules, the entering up judgment by default, and other matters in the vacation, and otherwiſe in a manner not repugnant to the laws of the United States, to regulate the practice of the ſaid courts reſpectively, as ſhall be fit and neceſſary for the advancement of juſtice, *and eſpecially to that end to prevent delays in proceedings.*"

I know not what language can convey a more complete power to the court over its proceſs than is given by the paſſages from the ſtatutes which have been cited. A uniform rule in the courts of the United States is very deſirable, that offenders and criminals may be brought to trial by the like forms in every ſtate for violations of the ſtatutes of congreſs. To allow one kind of proceſs in Virginia, and a different one in Maryland for the ſame offence, would be an heterogenious and unequal mode of adminiſtering juſtice. A conſtruction ought not to be given to the ſtatutes of congreſs, which admits of ſuch a ſyſtem, if it may poſſibly be avoided. Shall it be ſaid, that in one ſtate a

man who publiſhes a libel ſhall be arreſted immediately and brought to trial and puniſhed, while in another ſtate another perſon who has committed the ſame offence, ſhall be ſerved with a proceſs that ſhall be notice to him to make his eſcape: and ſhall it be ſaid, that ſuch a rule ſhall be applied to cafes where impriſonment is part of the puniſhment. It has been in proof, that in Maryland it is uſual to arreſt by capias in caſes of miſdemeanor, and to try the traverſer at the ſame term at which he appears: Are the courts of the United States, if ſitting on one ſide of the Potowmack, to be governed by one rule; and if ſitting on another ſide of the ſame river, to be governed by another rule, in caſes of crime or offence againſt the laws and conſtitution of the United States. It can never have been the intention of congreſs, that any ſuch variety of proceeding ſhould be allowed in practice, or that the proceſs ſhould be any where a ſummons in caſes of offences which were to be puniſhed by impriſonment.

This can be further illuſtrated by attention to the laws of congreſs inflicting puniſhment upon certain crimes, paſſed in the year 1790, for perjury, for bribery, for obſtructing by force the ſervice of legal proceſs, for importing ſlaves from foreign parts, for violence to an ambaſſador and for other offences relative to ambaſſadors; the puniſhment is fine and impriſonment. See 1ſt vol. Laws of the United States, page 111. The proceſs in all theſe cafes is to be the ſame; if a capias is proper in one it is proper in all, or if a ſummons is neceſſary in one it is neceſſary in all.

Suppoſe in regard to an ambaſſador who has applied to our ſecretary of ſtate for the puniſhment of an individual, who may have done violence to his perſon or to one of his family, that a ſummons ſhall have been iſſued to the offender who ſhould abſcond or remove himſelf. It would be deemed very ſtrange, perhaps incredible to the ambaſſador, if he ſhould be told by our ſecretary of ſtate, that the offence being committed in Virginia, it was neceſſary to ſummon the party to appear before the court, and inſtead of obeying the ſummons he had removed himſelf entirely, but if the ſame matter had been proſecuted in Maryland, the offender might have been inſtantly arreſted and puniſhed. The preſident of the United States regretted that the offender had eſcaped with impunity, but the eſcape was according to law. Would not ſuch an explanation be apt to be conceived an affront to the underſtanding of the ambaſſador?

On a former occaſion I read a rule of the ſupreme court made in Auguſt 1792, by which the judges declared, "that they conſidered the practice of the courts of king's bench in England, as affording outlines for the practice of this court, and that they will from time to time make ſuch alterations therein as circumſtances may render neceſſary;" and on the ſame occaſion reference was had to the practice of the king's bench, to ſhew that a capias was a proper and uſual proceſs. But it is neither neceſſary nor correct to admit that the rule of the king's bench in England, is abſolutely a rule for the circuit courts of the United States. It furniſhes a good outline of practice. The true poſition is, that neither the king's bench nor the ſtate laws furniſh rules to the federal courts in regard to proceſs, which are poſitively binding on them, but theſe courts are to eſtabliſh their own rules under the direction and controul of the ſtatutes of the United States.

It is a known and undiſputed maxim, that the criminal code of each ſovereign ſtate furniſh the rule in proſecutions in the ſtate courts, and is confined to offences againſt ſuch ſtate. An offence againſt the commonwealth of Virginia, is not an offence againſt the United States; and therefore the laws of Virginia which regard offences againſt itſelf, will have no effect touching offences againſt the United States, unleſs congreſs by their expreſs ſtatute has given to them ſome effect. The laws of Virginia and of every ſtate, have declared how an offence againſt ſuch ſtate reſpectively ſhall be proſecuted, but they are not to be applied to the circuit court of the United States, ſitting in ſuch ſtate, and holding cogniſance of crimes againſt the United States. In confirmation of this doctrine, ſuffer me to avail myſelf of the opinions of ſome very diſtinguiſhed characters in the Virginia convention which adopted the conſtitution. An eminent judge who preſided in the higheſt court of that ſtate for a long ſpace of time, I mean judge Pendleton, laid it down as too clear to be diſputed, that the powers of the federal judiciary ſhould be coextenſive with the powers of the federal legiſlature. In this opinion Mr. George Maſon coincided with that gentleman, although he was oppoſed to him on almoſt every other. Of the ſame opinion was another diſtinguiſhed member of the convention, who now holds the high office of ſecretary of ſtate. (3d vol. Virginia debates, pages 108, 121, 190.)

Unleſs then congreſs has made the laws of each ſtate the rules of proceſs to bring offenders before the circuit courts, thoſe laws do not bind the circuit courts in this reſpect, and there will be no foundation for the doctrine, that a circuit court of the United States ought to be governed by the laws of a ſtate in reſpect to proceſs to bring the party to anſwer. Where is ſuch a ſtatute of congreſs? not in their ſtatute books as I humbly conceive none ſuch has been produced

The honorable managers have referred to the 34th ſection of the ſtatute already mentioned, and upon that alone they rely. The words of the ſection are as follows: "*And be it further enacted*, That the laws of the ſeveral ſtates, except where the conſtitution, treaties, or ſtatutes of the United States ſhall otherwiſe require or provide, ſhall be regarded *as rules of deciſion in trials at common law in the courts of the United States, in caſes where they apply.*" We are to take the whole expreſſions of the ſection together, and this ſection is to be conſidered conjointly with all the other proviſions of the ſtatute. It makes the laws of a ſtate the rules of deciſion *in trials at common law where they apply*. The laws of the ſtate are to be rules of deciſion in trials. The proceſs which is awarded to bring in a party to ſtand his trial, is obviouſly different from the trial itſelf: rules *of deciſion in trials*, are not rules of *proceſs* antecedent to the appearance of the party. What is a trial at common law? A trial may be ſaid to begin with empaneling a jury, and to end with the judgment of the court: 4 Black. 352. A capias that is iſſued for the purpoſe of bringing the party to a *trial* by arreſting his perſon, cannot therefore be deemed a part of the trial itſelf. Whether the traverſer appears with or without proceſs, is ſeldom deemed material; it is only after he is brought to anſwer that his trial can commence.

If the conſtruction contended for by the managers be admitted, it will make this ſection militate againſt the 14th and 33d ſections of the ſame ſtatute, which expreſsly provide upon the ſubject of proceſs. Beſides it is unneceſſary to give this conſtruction, inaſmuch as the ſtatute provides amply reſpecting the ſteps preparatory to the trial. The 29th ſection regulates the mode of ſummoning a jury. There is no defect in the proviſions of the ſtatute which eſtabliſhes one ſyſtem that is to prevail every where, in regard to matters prior to the trial. Why would congreſs provide in reſpect to proceſs as they have done in the 14th and 33d ſections, if they meant to adopt the various laws of each ſtate in regard to proceſs, as has been contended by the managers. Congreſs has declared what kind of proceſs may be uſed in the circuit courts, and that proceſs of arreſt may be uſed. Our conſtruction is warranted by the rule of the ſupreme court that has been quoted, which rule was made long after the ſtatute of 1789, and which ſtatute is as obligatory on the ſupreme court as upon a circuit court. It is alſo warranted by the judgment of the circuit court in Pennſylvania diſtrict, in the caſe of the United States againſt the inſurgents, determined in the year 1795, before the reſpondent was elevated to the bench of the ſupreme court (2 Dal. 340, 341.)

In giving his opinion on the 34th ſection of the ſtatute, judge Peters obſerves, "although in ordinary caſes it would be well to accommodate our practice with that of the ſtate, yet the judiciary of the United States ſhould not be fettered and controuled in its operations, by a ſtrict adherence to ſtate regulations and practice. As to the clauſe in the law of the United States, directing that "the laws of the ſtates (with great exceptions) ſhall be regarded as rules of deciſion in trials at common law in the courts of the United States," I do not think it applies to the caſe before us."

In conformity to the rule of the ſupreme court and the authority of the caſe juſt cited, judge Chaſe determined that the laws of the ſtate of Virginia, which require a ſummons to be iſſued in caſes of the commonwealth, did not apply to the court of the United States. Why, let me again aſk, ſhould this ſection receive the conſtruction contended for by the honorable managers? It has been ſhewn that the laws of the United States provide fully in regard to the proceſs to be iſſued by their courts: that for the furtherance of juſtice ſuch a conſtruction is neither neceſſary nor convenient, and is inconſiſtent with other parts of the ſame ſtatute. It was therefore perfectly correct in the court to beſtow no attention upon the laws of Virginia concerning the proceſs to be awarded againſt Callender. When a preſentment was found by the grand jury, it was the duty of the court to act: it was their duty to award a proper proceſs for arreſting the offender. This is not only warranted by the principles and reaſons already adduced, but is inferable from various paſſages of the laws of congreſs, particularly from the 19th and 20th ſections of the ſtatute paſſed 30th April, 1790, 1ſt vol. page 108.

The learned counſel who defended Callender, appear from the teſtimony to have taken up ſome improper opinions relative to the criminal code of the United States. The ſubject was as they ſay, new to them, and for this reaſon let me remark, they might readily have fallen into error. It appears that they not only thought it was competent for a jury to decide upon the conſtitutionality of a law, but alſo that it belonged to the jury to aſſeſs the fine upon the traverſer, becauſe a jury has that power by the laws of the ſtate in reſpect to offences againſt the ſtate. In the like manner it is erroneouſly ſaid in the preſent proſecution, that the laws of the ſeveral ſtates in reſpect to proceſs, are the rules which ſhould guide the circuit courts of the United States.

I have, ſir, endeavored to ſhew in the firſt place, that there is no charge of criminality ſtated in the fifth article of impeachment, and therefore the reſpondent ought to be acquitted.

And in the second place I have endeavored to satisfy this honorable court, that the act stated in the article to have been done by judge Chase, was correct and legal in itself, and if legal, there remains no ground to presume or infer the smallest degree of evil intention. In this point of view he will also stand acquitted.

I will now proceed to make some observations upon the sixth article of impeachment: —"And whereas it is provided by the 24th section of the aforesaid act, intituled' "An act to establish the judicial courts of the United States," that the laws of the several states, except where the constitution, treaties, or statutes of the United States, shall otherwise require or provide, shall be regarded as the rules of decision in trials at common law in the courts of the United States, in cases where they apply; and whereas by the laws of Virginia it is provided, that in cases not capital, the offender shall not be held to answer any presentment of a grand jury until the court next succeeding that during which such presentment shall be made; yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial, during the term at which he the said Callender, was presented and indicted, contrary to law in that case made and provided."

The charge in this article against the respondent is in substance that he, with intent to oppress and procure the conviction of Callender, ruled him to trial during the term at which he was presented and indicted, contrary to the laws of Virginia, which it is alledged have provided that in cases not capital, the offender shall not be held to answer any presentment of a grand jury until the next succeeding court.

This article it is admitted does contain an accusation of crime; but I hope I shall be able to satisfy this honorable court, that in this instance no crime or offence was committed. I shall undertake to shew that no error in law was committed, and that if the judge had done otherwise, he would have been more liable to censure than he now is. If this be made to appear, as a supposed illegality of his conduct is the foundation of the charge, there will remain nothing to support the charge.

The accused judge had sworn to support the constitution of the United States, and to administer justice without respect to persons, and to perform all the duties of his office according to the laws of the United States. If in ruling Callender to trial at the same term at which he was indicted, he acted according to law, the judge performed his duty and ought not to be charged with oppression.

The article may be understood as affirming, that there exists some law of Virginia which positively prohibits the trial of a misdemeanor at the same term at which the indictment is found. No such law has been produced, and I must be allowed to deny that any such law of Virginia exists. The act of assembly of 1788, which provides that "upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons or other proper process against the person or persons offending, to appear and answer such presentment at the next court," appears to have given birth to the idea that an offender may not be tried for a misdemeanor at the same term he is indicted. It however does not warrant the position. When the party appears and answers the presentment, the trial may immediately take place. When the party appears and answers an indictment, the trial may immediately take place, *if* so ruled by the court, who are vested with a discretion unfettered by any positive statute. The defence of this article may therefore be placed on two grounds, either of which will be sufficient. 1st. There is no law of Virginia which prohibits the trial of a misdemeanor at the same term the indictment is found: and 2dly. If there be such a law, the same is not binding on the courts of the United States, in respect to offences against the United States.

With respect to the first ground, in addition to what was said it may be observed, that some instances have been proven before this honorable court, of trials in the state courts of indictments for misdemeanors, at the same term they were found. Mr. Robertson stated two specific cases where the punishment might be imprisonment. These instances shew there can have been no such positive prohibition by the laws of Virginia, as the article of impeachment has alledged; howsoever that may be, such a law, and that in the general practice of that state there are some exceptions, or such a general practice would not be obligatory on the courts of the United States, which is the second ground of defence against this charge.

A great deal which has been said in relation to the 5th article, applies with equal force to the article now under discussion.

When the supreme court by their rule of court deliberately formed, declared that the practice of the king's bench should form outlines for the practice in their court subject to the alterations they might make, it was reasonable and natural for the circuit court, composed of justices of the supreme court, to conduct its business upon the like principle. In the king's bench, process may be returnable immediately. Gilbert's origin of king's bench, page 313. 2.

Hawk, ch. 3. ſec. 14. 4. Black. 319. and ſuch is the practice if the offence is committed in the county where the court ſits; but if the offence is committed in another county, the proceſs may be returned to any day the court will appoint. The object of the court in uſing its diſcretion will be to inſure the ſervice of the proceſs, and its due return by allowing ſufficient time according to circumſtances for that purpoſe. It is not denied that *venire facias* is *a proper* proceſs in caſes not capital, but it is not *the only* proceſs that may be iſſued. Judge Blackſtone who wrote ſince Hawkins in the paſſage cited, declares that a capias is a uſual proceſs from the king's bench, and may be returnable at the pleaſure of the court, but that in ſtrictneſs there ought to be a *venire facias* where it is intended to proceed to outlawry. In the United States under the ſtatutes of congreſs, there can be no proceeding to outlawry, and therefore the reaſon for awarding a *venire* in England, does not hold in the United States in regard to proſecutions in their courts. But let the practice of the king's bench be as it may, it is merely to be uſed as an outline by our judges who will guide and direct themſelves by the ſtatutes of the United States, and will act in conformity to them. When proceſs has been ſerved and the offender brought into court to anſwer an indictment already found, it is the duty of the court to proceed to the trial. Such will be ſhewn to be the manifeſt direction of the laws of the United States. As to the laws of Virginia, it is repeated, there is no legiſlative act of that ſtate which fixes poſitively the time of trying an indictment for a miſdemeanor, and if there were, it would not bind the federal court. The *time* of a trial is not the trial but a circumſtance, which as well as the *place* of trial, is ſubject to the laws of the United States.

But it has been ſaid in ſupport of this article, that in England it is not uſual or according to the general courſe of proceedings, to try petty miſdemeanors at the ſame court that the traverſer pleads. For this is cited 4. Black. 351. and if is alſo ſaid that the practice of Virginia conforms to the practice in England in this inſtance. Let this be admitted, and what does it avail. The practice that has been mentioned applies only to *petty* miſdemeanors, and the law has always diſtinguiſhed between petty miſdemeanors and thoſe of a greater malignity. The practice does not apply to what are termed *crimina majora*. Can it be ſaid that ſuch a rule of practice applies to the caſe of Callender. Was he indicted for a petty miſdemeanor? no, ſir, he was not. I have long learned to abhor the deteſtable crime of calumny. A calumniator is the greateſt of criminals, and Callender has been the greateſt of calumniators. All have agreed in reprobating the wickedneſs of his calumnies: and ought the honorable judge who is now anſwering before you to have applied the rule of Engliſh and Virginia practice concerning petty miſdemeanors to ſuch a caſe as that of Callender? certainly not.

To place this matter ſtill more clear of doubt, I wiſh the honorable court to turn their attention to the conſtitution, and to a few clauſes of the laws of the United States. The ſixth amendment to the conſtitution provides, "that in all criminal proſecutions the accuſed ſhall enjoy the right to a ſpeedy and public trial by an impartial jury of the ſtate and diſtrict wherein the crime ſhall have been committed." In the ſame ſpirit of ſpeedy juſtice, a clauſe in the 33d. ſection of the ſtatute directs, that "copies of the proceſs ſhall be returned as ſpeedily as may be into the clerk's office of ſuch court, together with the recogniſances of the witneſſes, for their appearance to teſtify in the caſe which recogniſances the magiſtrate before whom the examination ſhall be, may require on pain of impriſonment; and if ſuch commitment of the offender or the witneſſes ſhall be in a diſtrict other than that in which the offence is to be tried, it ſhall be the duty of the judge of that diſtrict where the delinquent is impriſoned, ſeaſonably to iſſue, and of the marſhal of the ſame diſtrict to execute a warrant for the removal of the offender and the witneſſes, or either of them, as the caſe may be, to the diſtrict in which the trial is to be had. And upon all arreſts in criminal caſes, bail ſhall be admitted, except where the puniſhment may be death, &c."

With the ſame view to a ſpeedy trial, the 7th ſection of the ſtatute of 2 March, 1793, enacts, "that it ſhall be lawful for the ſeveral courts of the United States, from time to time, as occaſion may require, to make rules and orders for their reſpective courts, directing the returning of writs and proceſſes, &c. and otherwiſe in a manner not repugnant to the laws of the United States to regulate the practice of the ſaid courts reſpectively, as ſhall be fit and neceſſary for the advancement of juſtice, and eſpecially to that end to prevent delays in proceedings." Hence it is evident, that in bringing Callender to trial at the ſame term at which he was indicted and at which he pleaded, the court obeyed the injunction of the conſtitution, and it obeyed the injunction of the laws of the United States.

In caſes where bail is requirable to delay, the trial may be uſed to the oppreſſion of the accuſed. It is therefore injoined by the conſtitution and by the laws, that there ſhall be no delay. If the honorable judge who ſtands accuſed of trying Callender too ſoon, had deferred the trial to another term, that is to ſay ſix months,

and the traverſer could not have given bail, he would have been impriſoned ſix months without a trial. After he was convicted, the ſentence of impriſonment pronounced by the ſame judge was only an impriſonment of about nine months. He acted therefore not only according to law, but with humanity in bringing the traverſer to trial at the ſame term at which he was indicted. If the trial had been poſtponed to another term, and Callender in the mean time had been impriſoned, ſuch a conduct in the court would have given cauſe of complaint againſt the judge, who would then have been accuſed of poſtponing the trial of an innocent man, for the purpoſe of oppreſſion. What in ſuch a caſe ought the judge to have done? Exactly what he did. Obeying the conſtitution and the laws of the United States, he brought the traverſer to a ſpeedy and public trial.

It is, may it pleaſe the honorable court, upon theſe grounds that the reſpondent ſtands juſtified in his conduct, in relation to the charge contained in the ſixth article of impeachment.

In the diſtribution of the articles of impeachment among the counſel of the reſpondent he aſſigned to me the 5th and 6th, and I humbly indulge the hope that the defence which has been made, will be deemed ſatisfactory. But before I conclude, I hope I may be allowed ſhortly to advert to ſome of the remarks which have fallen from the honorable managers in reſpect to this part of the accuſation.

The honorable managers have attempted to ſhew a difference between a preſentment and an indictment, and that until the indictment was found, a capias ought not to have been iſſued, even if it were lawful to iſſue it upon an indictment. That there is no ſuch diſtinction, I appeal to thoſe paſſages of the acts of congreſs to which reference has been already made. I appeal to the reaſon of the thing and to the nature of a preſentment. It is a ſpecies of indictment, an informal indictment, it is an accuſation of a grand jury. There are caſes where it would be improper in a court to wait until a preſentment ſhall be put in the form of an indictment. Circumſtances may be ſuch, that the offender would eſcape if proceſs was not iſſued upon the preſentment.

One of the honorable managers charged the reſpondent with precipitancy in awarding the capias. If this gentleman had recollected the teſtimony, he would not have made that remark. It was undeniably proved that the reſpondent enquired of the clerk of the court and of the diſtrict attorney, what was the proper proceſs. Theſe officers anſwered, that a capias was the proper proceſs. Upon ſuch ſubjects it is uſual to enquire of ſuch officers, and their anſwer is generally deemed ſufficient by the courts.

It was in proof, that judge Chaſe informed the counſel of Callender they might except to any opinion given by the court, he would ſign their bill of exceptions and be the firſt man to grant a writ of error, this was intended to ſhew, that the reſpondent had no diſpoſition to injure or oppreſs the traverſer. To obviate any influence of this circumſtance favorable to the reſpondent it was intimated, perhaps aſſerted by ſome of the managers, that no writ of error could be maintained in ſuch a caſe of criminal proſecution, and that judge Chaſe well knew it, and that the offer was made merely for a cloak to his injuſtice and oppreſſion. This idea ſeemed to be derived from certain opinions of Virginia juriſprudence, and it was attempted to be proved that in Virginia, a writ of error did not lie in a criminal caſe and had never been granted and ſuſtained in that ſtate in its courts. This however can be and will be readily diſproved. Although one of the witneſſes, Mr. Hay, did not recollect with preciſion whether there was any bill of exceptions in the caſes concerning the Berkley clerk, which were carried ſtom the diſtrict court into the court of appeals; yet another of the witneſſes, Mr. Nicholas, the attorney general of Virginia, well remembers there was. Until theſe caſes were decided, which happened ſeveral years after the trial of Callender, it was the received law of that ſtate for the court of appeals to hold juriſdiction as a court of errors over criminal proſecutions. In ſupport of this doctrine I refer to the caſe of Newall againſt the commonwealth, adjudged in the year 1795. 2 Waſhington's Reports 88. It was againſt a magiſtrate for bribery in his office, and the judgment was reverſed with coſts. Alſo I refer to the caſe of Jones againſt the commonwealth, adjudged in the year 1799. 1ſt Call's Reports, 555. This was an indictment for an aſſault, and the judgment was reverſed. It is true that ſince the trial of Callender theſe caſes have been overruled, yet as the eſtabliſhed law was different at the time of his trial, the offer of the judge to grant a writ of error in the manner which has been proved, ought not to be attributed to any unjuſt or improper motives.

The learned counſel who ſpoke laſt, ſtated the practice in Maryland to be, to award a capias and to try the traverſer at the firſt term at which he pleads. This has been fully proved. As the reſpondent long preſided in the criminal court of Maryland, with honor to himſelf and great uſefulneſs to his country, it was quite natural for him to follow the like practice in Virginia.

It has been objected that the judge miſcon-

ducted himself towards the counsel during the trial of Callender in various instances, which it has been argued proceeded from a desire to convict and punish the traverser, howsoever innocent. I will observe with great deference, that if in the opinion of some gentlemen the judge did not act with becoming politeness to the counsel, it is not a high crime or misdemeanor, that may be examined or tried in this honorable court. But I trust upon a review of the circumstances as they have been given in evidence, that this court will be of opinion that the respondent behaved to the counsel with sufficient propriety. One of the counsel, Mr. Wirt, offered to the court a syllogism, to which the honorable judge promptly replied in a technical phrase of logic, and this excited in the audience some diversion. When another of the counsel, Mr. Nicholas, was speaking on the favorite topic of the right of the jury to consider the constitutionality of the sedition law, he was not interrupted by the judge. But Mr. Nicholas has been proved to have been always civil, always respectful to a court of justice; consequently the court would be civil to him. A third counsel, Mr. Hay, who was extremely desirous as he has himself testified, to make an oration, not only for the purpose of satisfying the jury but the audience, that a jury had a right to judge of the constitutionality of the sedition law, was interrupted by the judge, who denied his position. Mr. Hay had stated other matters during the trial which appeared to the judge to be erroneous. He had stated that a jury in this case of Callender, was the proper tribunal to assess the fine, in which he had been corrected by the court; that one of the jurors, Mr. Bassett, was not qualified to serve, &c. His zeal in the cause of liberty and the constitution, made him pertinacious in some things which the judge pronounced to be errors. It was no wonder then that such an advocate was stopped and often interrupted by the court. If any thing was done amiss by the judge during the trial, it was his desiring Mr. Hay to proceed in his own way, and promising to interrupt him no more let him say what he would: but this circumstance plainly evinces that the interruptions did not arise from corrupt motives. It may truly be said that judge Chase in his behavior to the counsel, was "all things to all men." To the logical Mr. Wirt, he was logical: to the polite Mr. Nicholas, he was polite: to the zealous and pertinacious Mr. Hay, he was warm and determined. If the counsel had conducted themselves with propriety towards the court, there would have been no interruptions; but when the judge found that the opinions of the bench were slighted, and that the conduct of the bar had a tendency to mislead and influence the public mind against a statute of congress, he endeavored to turn their sentiments and reasoning into ridicule, and he produced by his wit a considerable degree of merriment at their expence, of which no doubt colonel John Taylor, who has proved it for the prosecutors, was, from his natural temper, a full partaker.

Mr. President, it is now a very late hour, and I will bring my observations to a close.—The articles relative to Fries and Callender have been fully investigated: there is neither uncertainty or doubt as to the facts. I flatter myself that it has been shewn that those charges have not been supported by the evidence, and that the impeachment has proceeded from misinformation. If the honorable house of representatives had known as much as has been disclosed to this honorable court, they would not have deemed it necessary to have brought forward an impeachment. All must now be satisfied that the information on which the articles are grounded, has been derived from mistaken sources both in regard to fact and law. An aggregate body cannot be better guarded against misinformation than an individual: and I am induced to believe from the known integrity and virtue of the house of representatives, they will hear with satisfaction, that the evidence which they received was not the same which has been delivered before this honorable court, and that they will take pleasure in the acquittal of the respondent.

You are now about to set an example in a case of impeachment which will have a most important influence in our country. It will be an example to the tribunals in the several states who like you possess the power of trying impeachments, and who may learn from you by what rules the doctrine of impeachment is to be regulated: It will be a polar star to guide in prosecutions of this kind. You are about to set an example to the ordinary tribunals of justice in every corner of the United States.—They will know how this high court has done justice between the house of representatives of the American nation and a single individual, and hence they may learn how to do justice to the most weak and friendless individual, when accused in their courts by the most powerful. An upright and independent judiciary is all important in society. Let your example be as bright in its justice as it will be extensive in its influence. If the people shall find that their confidential servants, the house of representatives have brought forward an accusation against another of their servants for high crimes and misdemeanors in his exalted office, which after a fair and patient hearing has not been supported by evidence, it will afford them pleasure to hear of his honorable acquittal, and such may it please this honorable court will be I trust the result of your deliberations.

SATURDAY, February 23, 1805.

Mr. Rodney,

Mr. Preſident,

With the permiſſion of the learned counſel for the reſpondent, I wiſh to produce an authority or two, which I conceive material in this caſe, and wiſh to afford them an opportunity of attempting to controvert them. One of the counſel (Mr. Lee) has refered to the rules of the ſupreme court, where it is ſaid that "that court would conſider the practice of the king's bench, as forming the outline for them." And he has deduced this inferences that the circuit courts would follow the example of the ſupreme court, and be governed by the practice of the king's bench alſo. In order to ſhew the practice in England, I will refer to Bacon's Abridgement, 6 vol. page 656, where it is declared that the courts will poſtpone a trial for two terms, on account of the abſence of witneſſes, provided there is no cauſe of ſuſpicion that a delay was only intended. From this caſe I ſhall inſiſt, that judge Chaſe was bound to continue the trial of Callender. There is a caſe in Cowper's Reports, where the perſon accuſed made an affidavit of the abſence of a very material witneſs, who was out of the reach of the proceſs of the court. And the court informed the proſecutor, that unleſs he would conſent that the depoſition of the witneſs ſhould be taken and read in evidence, that they would poſtpone the caſe forever. In England, courts of common law have no power to iſſue commiſſions to take the depoſitions of witneſſes, unleſs by conſent, and therefore lord Mansfield declared, that although the court could not oblige the proſecutor to conſent, yet they would poſtpone the trial forever unleſs he did. But the ſtatutes of the United States expreſsly authoriſe the courts to iſſue commiſſions, and therefore there is force in the obſervation of judge Chaſe, that Callender's witneſſes lived in ſo diſperſed a ſituation that it was impoſſible to procure their attendance. In anſwer to the obſervations made by the counſel for the reſpondent, that a judge is not impeachable unleſs indictable, I will refer to a paſſage in the conſtitution of Pennſylvania :—where, although nearly the expreſs words on the ſubject of impeachment are uſed as in the conſtitution of the United States, yet it alſo provides for the removal of any judge, upon the addreſs of two thirds of the legiſlature. And there has been a recent caſe where a judge was removed, for indecent and ungentlemanly conduct towards his brother judge. I allude to the caſe of judge Addiſon. Mr. Addiſon made the ſame point which has been made in this trial, that a judge could not be removed unleſs for a violation of law, and that he had violated none. But he was ably anticipated by Mr. Dallas, and was as ably replied to by the attorney general of Pennſylvania (Mr. M'Kean) on this ſubject, and the ſenate did actually remove him. The conſtitution of the United States declares, "That the judges both of the ſupreme and inferior courts, ſhall hold their offices during good behaviour." And I mean to contend that miſdemeanor and miſbehaviour are convertible terms, and that a judge is liable to impeachment for a miſbehaviour in office. And ſurely ſir, if a judge miſbehaves himſelf in office and is removed for it, he has no perſon to blame but himſelf.

MR. MARTIN.

Mr. President,

DID I *only* appear in defence of a friend, with whom I have been in habits of intimacy for nearly thirty years, I should feel less anxiety on the present occasion, though that circumstance would be a sufficient inducement; but I am, at this time, actuated by superior motives. I consider this cause not only of importance to the respondent and his accusers, but to my fellow citizens in general, (whose eyes are now fixed upon us,) and to their posterity, for the decision at this time will establish a most important precedent as to future cases of impeachment.

In the discussion of this cause, I fear I shall occupy a greater portion of your time, than I could wish, but, as the charges are brought forward by such high authority as the House of Representatives of the United States, it becomes necessary to bestow upon them more attention than they would deserve, were they from a less respectable source.

We have been told by an honourable manager, (Mr. Campbell) that the power of trying impeachments was lodged in the Senate with the most perfect propriety; for two reasons,—the one, that the person impeached would be tried before those who had given their approbation to his appointment to office. This certainly was not the reason by which the framers of the constitution were influenced, when they gave this power to the Senate. Who are the officers liable to impeachment? The *President*, the *Vice-President*, and all civil officers of government. In the election of the two first, the Senate have no control, either as to nomination or approbation. As to *other* civil officers, who hold their appointments during good behaviour, it is extremely probable, that, though they were approved by one Senate, yet from lapse of time, and the fluctuations of that body, an officer may be impeached before a Senate, not one of whom had sanctioned his appointment, not one of whom, perhaps, had he been nominated after their election, would have given him their sanction.

This, then, could not have been one of the reasons for thus placing the power over these officers. But as a second reason, he assigned, that, if any other inferior tribunal had been entrusted with the trial of Impeachments, the members might have an interest in the conviction of an officer, thereby to have him removed, in order to obtain his place; but, that no Senator could have such inducement. I, Sir, disclaim, I hold in contempt the idea, that the members of *any* tribunal, would be influenced in their decision by so unworthy, so base a motive; but what is there to prevent this Senate, more than any other court, from being thus influenced? Is there any thing to prevent any member of this Senate, or any of their friends, from being appointed to the office of any person removed by their conviction?

I speak not from any apprehension I have of this honourable court. In their integrity I have the greatest confidence. I have the greatest confidence they will discharge their duty to my honourable client with uprightness and impartiality. I have only made these observations, to shew, that the reasons assigned by the honourable manager for vesting the trials of impeachment in the Senate, are fallacious.

I see two honourable members of this court, who were with me in the convention, in 1787, who as well as myself, perfectly know why this power was invested in the senate,

It was, because, among all our speculative systems, it was thought this power could no where be more properly placed, or where it would be less likely to be abused. A sentiment, Sir, in which I perfectly concurred; and I have no doubt, but the event of this trial will shew that we could not have better disposed of that power.

Let us now, Sir, examine the *Constitution*, on the subject of Impeachments, and from thence learn, in what cases, and in what only, impeachments will lie. To have correct sentiments on this subject, is of infinite importance. An error here, would be like what is called, an error in the first concoction, and would pervade the whole system.

By the Constitution, it is declared, that "The House of Representatives shall have the sole power of impeachment." That section, however, doth not declare in what cases the power shall be exercised. This is designated in a subsequent part of the Constitution, and I shall contend, that the power of impeachment is confined to the persons mentioned in the Constitution, namely, "the President, the Vice-President, and all other civil officers."

Will it be pretended, for I have heard such a suggestion, that the House of Representatives have a right to impeach *every citizen indiscriminately?* For *what* shall they impeach them? For *any* criminal act? Is the House of Representatives, then, to constitute itself into a Grand Jury to receive information of a criminal nature, against all our citizens, and *thereby to deprive them of a trial by Jury?* This was never intended by the Constitution.

The President, Vice-President, and other civil officers, can *only* be impeached. They only *in that case* are deprived of a trial by jury;—they, when they accept their offices, accept them on those terms, and as far as relates to the tenure of their offices, relinquish that privilege; they, therefore, cannot complain. Here, it appears to me, the framers of the Constitution, have so expressed themselves as to leave not a single doubt on this subject.

In the first article, section the the third, of the Constitution, it is declared, that judgment, in all cases of Impeachment, shall not extend further than removal from office, and disqualification to hold any office of Honour, Trust or Profit under the United States. This clearly evinces, that no persons but those *who hold offices* are liable to impeachment. They are to lose their offices, and having misbehaved themselves in such manner as to lose their offices, are with propriety, to be rendered ineligible thereafter.

The next question of importance, is, in what cases the House of Representatives have a right to impeach the President, the Vice-President, and the other civil officers.

It has been said, that a judge cannot be indicted for the same crime, for which he may be impeached: for, says the honourable manager, (Mr. Campbell) it would introduce the absurdity, that a person might be twice punished for the same crime.

This honourable court will observe, that the *two punishments*, which may *here* be inflicted on *impeachment* and *subsequent indictment*, amount to no more than in *England* takes place on a *single prosecution*; for there, on a *single* conviction, a judge may be removed from office, and *also* fined, imprisoned, or otherwise punished, according to the nature of his offence. But the *whole* of this power the United States have not vested in the *same* body. To the *Senate* they have *confined* the punishment of *removal from office*, and disqualification of the person from hold-

ing offices in future; but can there be a single doubt that a person, by impeachment, removed from office, cannot afterwards, according to the nature of his crime, be punished by indictment? Can gentlemen suppose a removal from office was intended to wash away all crimes the officer should have committed? what are the crimes for which an officer can be impeached? "Treason, bribery, and other *high* crimes and misdemeanors."

Suppose a judge removed from office, by impeachment, for treason, would that wash away his guilt? would he not afterwards be liable to be indicted, tried and punished as a traitor? undoubtedly he would, so in the case of bribery. Yet, if the gentleman's idea is correct, a removal from office on impeachment, for either of those crimes would free the officer from any other punishment. Consider the monstrous consequences which would result from the principle suggested by the managers, that a judge is only removable from office on account of crimes commited by him as a judge, and not for those, for which he would be punishable as a private individual! A judge, then, might break open his neighbour's house and steal his goods;—he might be a common receiver of stolen goods; for these crimes, he might be indicted, convicted and punished, in a court of law; but yet he could not be removed from office, because the offence was not committed by him in his judicial capacity, and because he could not be punished *twice* for the same offence.

The truth is, the framers of the constitution, for many reasons which influenced them, did not think proper to place the officers of government in the power of the two branches of the Legislature, further than the tenure of their office,—Nor did they choose to permit the tenure of their offices, to depend upon the passions or prejudices of jurors.—The very clause in the constitution, of itself, shews that it was intended, the persons impeached and removed from office, might still be indicted and punished for the *same* offence, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for *one offence*, could prevent the same person from being indicted and punished for *another* and *different* offence.

I shall now proceed in the enquiry, *for what* can the President. Vice-President, or other civil officers, and consequently, for what can a judge, be impeached? and I shall contend that it must be for an *indictable* offence. The words of the Constitution are, that "they shall be liable to impeachment for treason, bribery, or *other high* crimes and misdemeanors

There can be no doubt but that treason and bribery are indictable offences. We have only to enquire then, what is meant by *high* crimes and Misdemeanors." What is the true meaning of the word "*crime?*" It is the breach of some law, which renders the person, who violates it, liable to punishment. There can be no crime committed where no such law is violated. The Honorable gentleman to whom I before alluded, has cited the new edition of Jacob's Law Dictionary; let us then look into that authority for the true meaning of the word "*misdemeanor,*" He tells us

"*Misdemesnor, or Misdemeanour, a crime less than Felony. The term misdemeanour is generally used*

in contradistinction to felony, and comprehends all indictable offences, which do not amount to felony, as Perjury, Libels, Conspiracies, Assaults, &c. see 4 Comm. c. 1 p. 5

"*A Crime or misdemeanour, says Blackstone, is an act committed or omitted in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours, which properly speaking are mere synonymous terms; though in common usage, the word crimes is made use of to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentle name of misdemeanours only.*

"*In making the distinction between public wrongs and private, between crimes and misdemeanours, and civil injuries, the same author observes, that public wrongs, or crimes and misdemeanours are a breach and violation of the public rights and duties, due to the whole community, considered as a community in its social aggregate capacity.*" 4 Comm. 5.

Thus it appears, crimes and misdemeanors are the violation of a law, exposing the person to punishment; and are used in contradistinction to those breaches of law, which are mere private injuries, and only entitle the injured to a civil remedy.

Blackstone's Commentaries, 4th vol. page 5th, is cited by Jacob, and is as there stated. I shall not turn to it. Hale, in his pleas of the Crown, volume first, in his *Præmium*, which is not paged, speaking of the division of crimes, says,

"*Temporal crimes, which are offences against the Laws of this Realm, whether the common law or acts of Parliament, are divided into two general ranks or distributions in respect to the punishments that are by Law appointed for them, or in respect of their nature or degree; and thus they may be divided into capital offences, or offences only criminal, or rather, and more properly into felonies and misdemeanors. And the same distribution is to be made touching misdemeanors, namely they are, such as are so by the common law, or such as are specially made punishable, as misdemeanors by acts of Parliament.*"

Thus then it appears, that crimes and misdemeanors are generally used as synonymous expressions, except that "crimes" is a word frequently used for *higher* offences. But while I contend that a Judge cannot be impeached except for a crime or misdemeanor, I also contend that there are many crimes and misdemeanors for which a judge ought not to be impeached, unless immediately relating to his judicial conduct. Let us suppose a judge, provoked by insolence, should strike a person; This certainly would be an *indictable*, but not an *impeachable* offence. The offence for which a judge is liable to impeachment, must not only be a crime or misdemeanor but a *high* crime or misdemeanor. The word "crime" as distinguished from misdemeanor, is applied to offences of a more aggravated nature, the word "*high*," therefore, must certainly equally apply to misdemeanors as to crimes. Nay, Sir, I am ready to go further, and say, there may be instances of *very high* crimes and misdemeanors, for which an officer ought not to be impeached, and removed from office; the crimes ought to be such as relate to his office, or which tend to cover the person, who committed them, with *turpitude* and *infamy*; such as shew there can be no dependence on that integrity and honor

which will secure the performance of his official duties.

But we have been told, and the authority of the State of Pennsylvania has been cited, by one honorable manager (Mr. Rodney) in support of the position that a judge may be impeached, convicted, and removed from office, for that, which is not indictable; for that which is not a violation of any law.

What, Sir, can a judge be impeached and deprived of office, when he has done nothing which the laws of his country prohibited? Is not deprivation of office a punishment? Can there be punishment inflicted where there is no crime? Suppose the House of Representatives to impeach, for conduct not *criminal*, the Senate to convict, doth that change the law? No, the law can only be changed by a bill brought forward by one House *in a certain manner*, assented to by the other, *and approved by the President*.—Impeachment and conviction cannot change the law, and make that *punishable* which was not *before criminal*.

It is true, it often happens that the good of the community, requires that laws should be passed, making criminal and exposing to punishment, conduct, which antecedently was not punishable; but even in those cases, government has no power to punish acts *antecedently* done; it can only punish those acts done *after* the enaction of the law. The constitution has declared, "no *ex post facto* law shall be passed."

Should *such* a principle be once admitted or adopted, could the officers of government ever know how to proceed?—Admit that the House of Representatives have a right to impeach, for acts which are not contrary to law and that thereon the Senate may convict, and the officer be removed, you leave your judges, and all your other officers at the mercy of the prevailing party. You will place them much in the unhappy situation as were the people of England, during the contest between the white and red roses, while the doctrine of constructive treasons prevailed. They must be the tools or the victims of the victorious party.

I speak not, Sir, with a view to censure the principles or the conduct of any party, which hath prevailed in the United States since our revolution, but I wish to bring home to your feelings, what may happen at a future time. In republican governments there ever have been,—there ever will be, a conflict of parties. Must an officer, for instance a judge, ever be in favour of the ruling party, whether wrong or right? or, looking forward to the triumph of the minority, must he, however improper their views, act with them? Neither the one conduct or the other is to be supposed but from a total dereliction of principle. Shall then a judge, by honestly performing his duty, and very possibly thereby offending both parties, be made the victim of the one or the other or perhaps of each, as they have power? No, Sir, I conceive that a judge should always consider himself safe while he violates no law, while he conscientiously discharges his duty, *whomever* he may displease thereby.

But an honorable manager (Mr. Campbell) hath read to us an authority to prove, that a judge cannot in England be proceeded against by indictment for violation of his official duties but only in Parliament, or by impeachment; his authority was the new edition of Jacob's law dictionary; Let me be indulged with reading to this honorable court the case from 12 Coke, the case of Floyd and Barker, to which Jacob refers, and it will be found that the reasons there assigned however cor-

rect they might be as to judges in England, can have no possible application to the judges of the United States ; [Here Mr. Martin read the following part of the third resolution in that case ; to wit :]

" *It was resolved that the said Barker who was judge of assise, and gave judgement on the verdict upon the said W. P. and the sheriff who did execute him according to the said judgement, nor the justices of peace who did examine the offender, and the witnesses for proof of the murder before the judgement, were not to be drawn in question, in the Star-chamber, for any conspiracy ; nor any witness, nor any other person ought to be charged with any conspiracy in the Star-chamber, or elsewhere, when the party indicted is convicted or attaint of murder or felony and although the offender upon the indictment was acquitted, yet the judge, be judge of assise, or a justice of peace, or any other judge by commission and of record, and sworn to do justice, cannot be charged for conspiracy for that which he did openly in court as judge or justice of peace : and the law will not admit any proof against this vehement and violent presumption of law, that a justice sworn to do justice, will do injustice, but if he hath conspired before, out of court, this is extra-judicial, but due examination of causes out of the court, and inquiring by testimony, and similar, is not any conspiracy, for this he ought to do ; but subornation of witnesses, and false and malicious prosecutors, out of court, to such whom he knows will be indictors, to find any guilty, &c. amounts to an unlawful conspiracy.*

" *And as a judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the King.*

" *And the reason and cause why a judge, for any thing done by him as judge, by the authority which the king (concerning his justice) shall not be drawn in question before any other judge, for any surmise of corruption, except before the king himself, is for this ; the king himself is de jure to deliver justice to all his subjects ; and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath,*

" *And forasmuch, as this concerns the honor and conscience of the kings, there is great reason that the king himself shall take account of it, and no other.*"

But, even in England it has been solemnly determined, that judges may be proceeded against by indictment for the violation of the laws in their official conduct, for which I refer this honorable court to Viner's abridgment, 14th vol. page 579 (F) pl. 3 and in notes, where he says,

" *A justice cannot rase a record, nor imbesil it, nor file an indictment which is not found, nor give judgment of death where the law does not give it, but if he doth this it is misprison and he shall lose his office, and shall make fine for misprison.*" In the note " Brooke, Corone pl. 173 cites 2 R. 3. 9, 10. S. C. and P, and that he shall be *indicted*, and arraigned."

And to Hawkin's pleas of the crown, vol. 1st, chapter 69, F. 6. where that author tells us

" *It is said, that at common law, bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason, before the 25th Ed.*

3d. and at this day it certainly is a very high offence, and punishable, not only with the forfeiture of the offenders office of justice, but also with fine and imprisonment, &c."
Hawkins, 1st vol. cap. 69 6.

Mr. President, the principle I have endeavoured to establish, is, that no judge or other officer can, under the constitution of the United States, be removed from office but by impeachment and for the violation of *some law*, which violation must be, not simply a crime or misdemeanor, but a *high* crime or misdemeanor.

But an honorable manager (Mr. Rodney) who has this morning referred to some authorities, as to other parts of the case, has also contested the correctness of the aforegoing principle, and has introduced the constitution of the State of Pennsylvania, by which he hath told us, a judge may by the governor be removed from office, without the commission of any offence, upon the vote of two thirds of the two Houses for his removal ; notwithstanding that constitution hath a similar provision for removal by impeachment as hath the constitution of the United States. To this I answer, as we have no *such provision* in the constitution of the United States, the *reverse* is to be inferred, to wit, that the people of the United States, from whom the constitution emanated, did not intend their judges should be removed, however obnoxious they might be to *any part*, or to the *whole*, of the legislature, unless they were guilty of some high crime or misdemeanor, and then only by impeachment. It is also well known, that the governor of Pennsylvania, hath not considered those words in the constitution of that State " that he *may* remove the judges on such address," as being *imperative*. For in a recent instance, where he did receive such address, instead of admitting the construction to be, as was contended, "*you must*" he determined it to be "*I will not*," and I have had the pleasure of seeing that judge, sometime since that transaction, on the bench with his brethren dispensing justice. I again repeat that as the framers of the constitution of the United States, did not insert in their constitution such clause as is inserted in the constitution of Pennsylvania, it is the strongest proof, that they did not mean a judge or other officer, should be displaced by an address of any portion of the legislature, but only according to the constitutional provisions.

The same gentleman (Mr. Rodney) has told us, that the tenure by which a judge holds his office, is good behaviour, therefore that he is removable for misbehaviour ; and further, that misbehaviour and misdemeanor are synonymous and, coextensive. Here I perfectly agree with the honourable gentleman, and join issue with him. Misbehaviour and misdemeanor are words equally extensive and correlative ; to misbehave or to misdemean is precisely the same ; and, as I have shewn that to misdemean, or, in other words to be guilty of a misdemeanor, is a violation of some law punishable, so of course, misbehaviour must be the violation of a similar law.

The same honourable gentleman has mentioned the impeachment and conviction of Judge Addison, and hath told us that he was not impeached for the breach of any law, but only for rude or unpolite conduct to his brother judge ;—that *this objection* was made with much energy on his defence, but that the Senate were convinced by the great talents and eloquence of Mr. Dallas,

and some other Gentleman, that the objection was groundless, they therefore convicted and removed him. I have not here the proceedings against Judge Addison, and therefore it *is possible* the Senate of Pennsylvania erected themselves into a court of honour to punish what they might consider breaches of politeness ; but doth this honourable court sit here to take its precedents from the state of Pennsylvania or any other state, however respectable ? I should rather hope that this honourable court should furnish precedents, which might be respected and adopted by the different states. I would also ask, when was that precedent established ? was it not at a time when there is too much reason to believe that the warmth and violence of party had more influence in it than justice; and, that the senate of Pennsylvania overleaped their constitutional limits ? but if we are to go to Pennsylvania for a precedent, why should we not be guided by that, which the same state has so recently given us in a trial in which that gentleman bore so conspicuous a part ? a precedent of *acquittal* ; a precedent, which we are perfectly willing should be adopted, and which we trust will be adopted on the present occasion.

My observations thus far have been principally with a view to establish the true construction of our constitution, as relates to the doctrine of impeachment. I, now, Mr. President, will proceed to the particular case before this honourable court, and in the first place I agree with the honourable managers, that there is a manifest difference even between the credibility of witnesses, and the credibility of testimony, for I admit, if witnesses are equally credible and some swear that words were uttered, or acts were done ; and others that they did not hear the words, or that they did not see the acts done, the presumption is certainly in favor of the positive, and against the negative testimony. But this must be admitted with considerable restrictions.

If, immediately after a transaction, there is a full and clear memory of the words spoken, or the acts done, there is great reason to credit the testimony ; but even in that case, if there are a number of persons equally respectable, having equal opportunity to hear and see, and who were attentive to what took place, and none of them heard or saw, what is testified by a single witness, there would be great reason to suspect the affirmative witness to be mistaken ; more so if the transactions had happened for some years antecedent to the examination.

But, as to *Heath*, we do not contradict him *merely by negative testmony* ; we contradict him by a series of positive facts which my honourable colleague (Mr. Key) has detailed, proved by characters, whose *veracity cannot be doubted*, which positive facts incontestibly shew that what he swore never could have taken place : And, here again, permit me, Sir, to make a further observation ; that, where a person is charged *criminally* for words he is supposed to have uttered, those words ought to be proved *with precision*. Every witness on *this* occasion, who have been examined as to expressions used by my honourable client, either on the one or other charge, which are held as exceptionable, declares he cannot pretend to recollect the express words uttered by the judge, but only to state what at this distance of time, he can consider the amount of what was said. Nay, Messrs. Lewis and Dallas declare further, that they cannot pretend to say with accuracy, what part of the conversation, of which they give tes-

timony, took place on the first or the second day, or in what order. Such kind of testimony, therefore, ought to be received with great caution, and not to be considered as conclusive. On this subject I will trouble this honourable court with a passage from M'Nally's treatise on evidence, page 518.

" *It is no evidence in a criminal case, that the defendent said so and so, or in other words to the like effect, because the court must know the very words to judge of their force and effect*, 2 Hawk. ca. 46.

" *And the reason of this rule is, that of words spoken, their can be no tenor, that is transcript, for there is no original to compare them with, as there is of words written: and though there have been attempts to plead a tenor of words spoken, it has never been allowed. And therefore if a plaintiff declares for words spoken a bariance, in the omission or addition of a word, is not material, and it is sufficient, if so many of the words be proved and found as are in themselves actionable.* 12. Vin. abr. 68. pl. 46.

" *So in Hussey* v. *Cooke, Easter*, 18. *Jac.* 1. *in the Star-chamber. The court held, that if a witness depose that a defendant did persuade a juror to appear and do him reasonable favour, or words to the like effect, this is no sufficient proof in criminals, because the court must know the very words to judge of their force and effect.* Hob. 294. Fort. 200. 1 Hale p. 6. 111 Rel. 14.

" *Hale, Coke, and Forter, fully justify the principle of this rule. Forter says, as to mere words supposed to be treasonable, they differ widely from writings in point of real malignity, and proper evidence. They are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal. And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words to any act or design are not overt-acts of treason.* Fort. 200.

" *Keyling says, I see no difference between words reduced into writing and words spoken. Forter answers, the difference appeareth to me to be very great, and lieth here. Seditious writings are permanent things, and if published, they scatter the poison far and wide. They are acts of deliberation capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the court, naked and undisguised as they come out of the author's hands. Words are transient and fleeting as the wind, the poison they scatter is at the worst confined to the narrow circle of a few hearers: they are frequently the effect of sudden transport, easily misunderstood and often misrepeated.* Keyling 13. Fort. 200.

" *The suppression of a word or syllable may change the sense; so the change of an emphasis. So words spoken in exclamation, conveying by sound and gesture surprise and abhorrence, may be represented in evidence as spoken blasphemously or seditiously.*"

Sir, Michael Foster, a judge whose worth has seldom been equalled, perhaps never surpassed, and who has so correctly observed that a *popular* judge, that is, one who in his decisions seeks after popularity, was one of the most contemptible beings in the world, is referred to as an authority.

This principle equally applies, where a person is charged *criminally* on account of words spoken, whether

the offence is supposed to be treason, or only misdemeanor; the case referred to in Hobart, page 294, is an authority in point;—it is true, this case was determined in the *Star chamber*, but being determined in favor of the person *accused*, it becomes an higher authority—Star chamber cases are only complained of on account of their oppression.

I will now, Mr. President, proceed to consider the conduct of my honourable client on the trial of Fries, and to examine the law upon that case, and of course to investigate the rights of judges, in criminal cases, as well as the rights of attornies. I do not mean to go minutely into the testimony, which has been given in that case: but, taking it up on that given by Messrs. Lewis and Dallas, to examine whether the court is to controul the counsel, or to be mere cyphers, destitute of authority to restrain and keep within bounds the lawyers when acting improperly. The whole of the practice, of which I have heard, during this trial, as being usual in the courts of Pennsylvania and Virginia, hath been to *me*, *at least*, *as novel* as the conduct of Judge Chase appears to have been to the honourable managers. *I*, Sir, have *always* considered it the province of the court in the course of a trial, in *all* cases, whether civil or criminal, to declare what is the law. This right is admitted in civil cases, but, it seems, is denied in criminal. And therefore, it is contended, that in criminal cases, counsel have a right to address the jury upon the law, and to urge them to determine the law in contradiction to the decision of the court. How doth the jury acquire the *power* of deciding the law in *any* case? Because, upon the general issue, having a right to give a general verdict, which involves both law and fact, the jury *incidentally* have the power to decide the law. But this doth not authorize them to give a verdict *contrary* to law. When a case comes before a jury, the court informs them what is the law if they believe the facts given in evidence; if they do believe the facts, they are *bound in duty* to decide according to the law thus explained to them by the court. The decision *ought* to be the same as if the facts had been found by the jury in a special verdict, and the law left to the court. The jury, I admit, have the *power* to decide the law contrary to the direction of the court, but I deny that they have a *right* to do it. No person will deny that it is much more proper for the court to decide the law than that it should depend upon jurors, who in general are ignorant of the law. In civil cases, a jury sometimes give a verdict contrary to the direction of the court, but the court correct this abuse of power, by interposing and granting a new trial, thereby correcting the evils which would result from such abuse.

Let us then examine this question as to criminal cases. Is it not as important to society, that there should be uniform and fixed principles for the decision in criminal as in civil cases? Would it not be highly improper that one man should be convicted for a crime, and another who had committed the same, be acquitted, merely from the passions, prejudices or ignorance of jurors, influenced thereby to divide the law differently in the different cases, though perfectly similar in criminality? no person can doubt on this subject.

Where then is the difference between civil and criminal cases? It is not that the jury have a *greater*

right to decide the law in the *last* than in the *first*; but, that having the power to give a general verdict, which *incidentally* involves the law, they may give a verdict contrary to law, and contrary to the direction of the court; and the courts of justice, not having in criminal cases, through tenderness, enforced the remedy of a new trial, the abuse of power, thus practised in some cases by juries, have been uncorrected. No person can doubt, but that juries in criminal as well as in civil cases *ought* to give their verdict according to law, and, when ever they do not, they are answerable to their consciences and to their God, however they may be exempt from human punishment.

The *right* of the court to decide the law is the *same* in criminal as in civil cases. If there is a demurrer to an indictment, the court decides without the intervention of a jury. If there is a demurrer to evidence, the court decides the law—so if a special verdict is found, which may de found in a criminal, as well as in a civil suit.

The *power* of the jury, as I have before said, to decide against law, doth not give them the right, any more than the *power* of a person to knock down a man weaker than himself gives him the right so to do. And if juries in any case, knowingly give a verdict contrary to the law, instead of acting *impartially*, which is the duty of a jury, they act with *criminal partiality*.

So great is the difference of sentiment between the honorable managers, and some of the witnessess, who have been examined in this trial, and myself, upon the *right* of juries to decide the law in criminal cases, that in confirmation of my own sentiments, and to convince this honorable court I do not wish to impose upon them; I hope I shall be indulged in reading to them a very respectable authority upon this subject. It will be found in Co. Lit. 155, as follows:

"*The most usual trial of matters of fact, is by twelve such men; for, ad quæstionem facti non respondent judices; and matters in law the judges ought to decide and discuss; for, ad quæstionem juris non respondent juratores.*" Upon this is the following note:

"*This decantatum, as Lord Chief Justice Vaughan calls it on account of its frequency in the books, about the respective provinces of judge and jury, hath, since Lord Coke's time, become the subject of very heated controversy especially on prosecutions for State libels; some aiming to render juries wholly dependent on the judge for matters of law, and others contending for nearly a complete and unqualified independence.*"

"*In respect to my own ideas on this suject, says Mr. Hargrave, they are at present to this effect.*

"*On the one hand, as the jury may as often as they think fit, find a general verdict, I therefore think it unquestionable, that they so far may decide upon the law as well as fact, such a verdict necessarily involving both. In this I have the authority of Littleton himself, who writes, that if the inquest will take upon them the knowledge of the law upon the matter, they may give their verdict generally:*

"*But on the other hand I think it seems clear, that questions of law generally and more properly belong to the judges; and that, exclusively of the fitness of having the law expounded by those who are trained to the knowledge of it by long study and practice, this appears from various considerations.*

"*1st. If the parties litigating, agree in their facts, the cause can*

never go to a jury, but is tried on a demurrer; it being a rule, and I believe without exception, that issues in law are ever determined by the judges, and only issues of fact are tried by a jury.

"2d. Even when an issue in fact is joined, and comes before a jury for trial, either party, by demurring to evidence, which includes an admission of the fact to which the evidence applies, may so far draw the cause from the cognizance of the jury, for in that case the law is reserved for the decision of the court from which the issue of the fact comes, and the jury is either discharged or at the utmost, only ascertains the damages.

"3d. The jury is supposed to be so inadequate to finding out the law, that it is incumbent upon the judge who presides at the trial, to inform them what the law is; and, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster, the 2d. C. 31, make his exception in writing to the judges direction, and inforce its being made a part of the record, so as afterwards to found error upon it.

4th. The jury is ever at liberty to give a special verdict, the nature of which is to find the fact at large, and leave the conclusion of law to the judges of the court from which the issue comes. Formerly indeed it was doubted, whether in certain cases in which the issue was of a very limited and restrained kind, the jury was not bound to find a general verdict. But the contrary was settled in Dowman's case, 9. Coke, 11. b. and the rule now holds both in criminal and civil cases without exception.

5th. Whilst attaints, which still subsist in law were in use, it was hazardous in a jury to find a general verdict where the case was doubtful, and they were apprized of it by the judges, because if they mistook the law, they were in danger of an attaint.

6th. If the jury find the facts specially, and add their conclusion as to the law, it is not binding on judges, but they have a right to controul the verdict, and declare the law as they conceive it to be.

7th. The courts have long exercised the power of granting new trials in civil cases where the jury find against that, which the judge trying the cause, or the court at large, holds to be law; or where the jury find a general verdict, and the court conceives that on account of difficulty of law there ought to have been a special one. Though too in criminal and penal cases, the judges do not claim such a discretion against persons acquitted, the reason I presume is in respect of the rule that nemo bis punitur aut vexatur pro eodem dilecto, or the hardship which would arise from allowing a person to be put twice in jeopardy for one offence, and if this be so, it only shews that on that account, an exception is made to a general rule. Upon the whole, as my mind is affected with this interesting subject, the result is, that the immediate and direct right of deciding upon questions of law, is entrusted to the judges; that in a Jury it is only incidental; that in the exercise of this incidental right the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and therefore, that in all points of law, arising on a trial, juries ought to shew the most respectful deference to the advice and recommendation of judges. In favor of this conclusion, the conduct of juries bears ample testimony; for to their honor it should be remembered, that the examples of their resisting the advice of a judge, in points of law, are rare, except where they have been provoked into such an opposition by the grossness of his own misconduct,

or betrayed into an unjust suspicion of his integrity by the misrepresentations and ill practices of others. In civil cases, particularly where the title to real property is in question, juries almost universally find a special verdict as often as the judge recommends their so doing; and, though in criminal cases special verdicts are not frequent, it is not from any averseness to them in juries, but from the nature of criminal causes, which generally depend more upon the evidence of facts than any difficulty of law. Nor is it any small merit in this arrangement, that in consequence of it, every person accused of a civil crime, is enabled by the general plea of not guilty, to have the benefit of a trial, in which the judge and jury are a check upon each other; and that this benefit may be always enjoyed, except in such small offences as are left to the summary jurisdiction of a justice of the peace, which exception, from the necessity of the times, is continually increasing, but which however cannot be too cautiously extended to new objects. Thus considered, the distinction between the office of judge and jury seems to claim our utmost respect. May this wise distribution of power between the two, long continue to flourish, unspoiled either by the proud encroachments of ill designing judges, or the wild presumption of licentious juries."

In this prayer I most cordially join, and with the learned commentator, hope that this wise distribution of power may long continue to flourish unimpaired either by the proud encroachments of ill-designing judges, or the wild presumption of licentious jurors. Such as I have here stated, I consider the principles of the English law, and to these principles I cheerfully subscribe.

But the principles adopted on this impeachment, and advocated, as I understand, by the honourable Managers, appear to me to have a direct tendency to break down every barrier between the province of the court and the jury, giving every thing to the latter and nothing to the former, and so far from placing them or the counsel under the direction and controul of the court, prohibit the court from restraining either the jury or the counsel, under the danger of impeachment. I differ with them. If in any case the law is known to be settled by a uniformity of decisions, a court of justice *degrades* itself if it permits counsel to take up their time in arguing against it; If the question is not considered as fully settled, counsel certainly ought to be heard, but it is to the court they ought to address themselves. In England the first lawyers who have ever existed, have not thought themselves degraded by arguing the law in criminal as well as in civil cases, before the court. If counsel should attempt to impose on the jury what is not law, is the court to sit tamely by, and suffer them to proceed? Such has not been the practice in the courts which I have attended. Where the law is known to be settled, or where, upon application to the court, a determination is given, the counsel must go before the jury upon the fact, and endeavour to distinguish his case, and shew that it doth not come within the law as established; or should counsel attempt to state any thing to the jury, which appears designed to controvert the law as declared, they are immediately stopped by the court, and to persist would be considered highly indecorous, nor would the court permit it to be done. In Maryland the lawyers do not claim as a constitutional right, to mislead and deceive the judges, much less

to mislead and deceive the jurors, free from any controul of the court.

But it has been said that Juries are most proper to decide the law in criminal cases, thereby to prevent a criminal from being borne down and oppressed by the weight of the prosecuting power. What case can arise in the country, to which this argument can apply? In England, before the revolution, while judges were dependant on the crown, if also wicked and corrupt, there might, where government was interested, be some such cases. But is our situation to be compared to that of England, at that time? If so, it was not worth while for us to have taken upon ourselves the risques of the late revolution to have changed our government.

Is there any thing to induce judges to oppress any individual even though offensive to government, while they are *independent*? Any danger of that kind is to be apprehended from judges who are *dependent*.

And hence flowed the great constitutional provision, which secures the independence of the judges, which secures them from being removed or punished while they discharge their duty.

What probability is there that a judge would do injustice to any person with a view to please any party, when he could have but *very little prospect of reward*, and would be sure that though he did his duty he could not be removed from office or exposed to injury?

I wish this honourable court to reflect on the nature of man. In a government like ours, there will always be majorities and minorities. Minorities will often be powerful, and frequently in due time become majorities: If a judge should do an act pleasing to the majority, he must know it may render him hateful to the minority, who in course of events, may get the power in their hands. If he endeavours to ingratiate himself with the minority, he exposes himself to the displeasure of the ruling majority. *It is the duty of a judge to enforce the laws, while they exist, however unpopular those laws may be to any portion of the community.* If he enforces such laws, he will gain the approbation of one party, but he will as certainly be disapproved by the other. Would you then wish that your judges should be exposed to be removed from office because, by the *most honest conduct*, they had displeased one party or the other, and leave them at the mercy of those who should from time to time, hold the power of government in their own hands? No, it is the *sacred independence* of the judiciary, and that *alone*, which can be the best security that the judges shall not act with oppression.

But let me ask further, are juries more free from undue influence than judges? Have they greater inducements to do what is right? They do not possess the elevated situation of the judges, they feel not the same responsibility; whatever may be the impropriety of their conduct, it would probably be scarcely heard of out of their own neighbourhood, not long even there. They are liable to all the political prejudices of men devoted to the different parties which may exist;—They are generally men totally ignorant of the law, nay, I shall prove when I come to speak of Basset's case, that though the managers contend the jury should decide the law, yet ignorance of the law is by them considered the first recommendation of, nay, a necessary requisition for a juror!

Can it then be wise to reduce a judge to the humiliating situation of having the law decided by such a body, exposed to be led into error by the ingenuity of counsel? Can it be the wish to trust their property, their lives, all that is most dear to them, *even as to legal questions*, to the *wild ideas* of jurors, liable to all the frailties of human nature, in preference to the sound discretion of judges well skilled in the law, and holding a high and responsible station?

Having laid down these general principles as to the relative rights and duties of the court, the bar, and the jury, I shall proceed with my honorable client to the State of Pennsylvania.

It was known that John Fries, charged with treason, had, on a former trial, been found guilty, and that a new trial had been granted upon a suggestion, which I hope will not become a precedent—will never be a rule for decisions. When I say this, I mean not to detract from the merit of that highly respectable character who presided, and who granted the new trial. His conduct flowed, I am convinced, from his humanity; his was the error of the heart, not of the head. It was an honest nay an amiable error. My honorable client knew, when he arrived at Philadelphia, that the trial of Fries was to take place that term. He has been acknowledged by the honorable managers, to be a gentleman of the highest legal talents. In this they have only done him justice; and have been as prodigal of their praise as his warmest friends could have wished. It would have given me great pleasure if they had been as *just* in expressing their sense of his integrity. He had been in the practice of the law for forty years, and also a judge for a number of years, and for about six years I believe, presided in the criminal court of Baltimore county, where, during that time, there were more criminal trials probably than in any other court in America. I believe I speak moderately, when I say that I have attended on behalf of the State, at least five thousand criminal trials in that court. From those circumstances it is to be presumed that he was not deficient in knowledge of what related to criminal proceedings, but would he have acted the part of an upright judge, if he had not endeavoured to make himself master of the law of treason, when a case of that nature was about to come before him; particularly the law of treason as it related to levying war against the United States, or in adhering to those who levied war against them, which is the only kind of treason that our constitution acknowledges; although I have heard I must own, of *treason* against *principles* of the constitution, and *treason* against the *sovereignty* of the people, words well enough suited to a popular harangue, or a news-paper essay, but not for a court of justice.

When judge Chase arrived at Philadelphia, he had the advantage of perusing the notes of judge Peters and the district attorney, relating to the former trial; he thereby became well acquainted with all the points at that time made by the counsel for Fries; and Mr. Lewis has sworn, that all the points, which were intended to have been made before Judge Chase, had been made at the former trial. Why then should the court either wish, or be obliged to hear counsel again on the law? In two previous cases the law had been settled. Judge Patterson, a gentlemen of the first abilities, mild and amiable, whom no person will charge with being of a vindictive oppressive disposition, and who certainly has

more suavity of manners than my honorable client, had, after a most patient and full hearing, where eminent counsel attended, decided the law as was decided by the respondent. Judge Iredell, whose encomium has been most justly given us by the managers, a gentleman of great legal talents, than whom no worthier man has left this for a better world; and who, while living, honored me with his friendship, after having heard Messrs. Lewis and Dallas, and after full and patient investigation, gave, in the case of Fries himself, a similar decision; in both which opinions Judge Peters perfectly coincided. Under these circumstances, Judge Chase, who had no doubt of the propriety of those decisions, to prevent waste of time when there was so much business to transact, and to facilitate the business, thought it best to inform the counsel on each side, that the court considered the law to be settled, and in what manner. For which purpose they delivered to the clerk three copies of their opinion, one for the counsel on each side, the third to be given to the jury, when they left the bar. On this subject, Mr. Lewis, in his testimony, said it was to be given to the jury when the counsel for the United States had opened, or after he had closed the pleadings, but he believed the *last*. Mr. Rawle is clear that it was to be given to them, when the case was finished, to take out with them.

No gentlemen on behalf of the impeachment has denied the correctness of this opinion. But the criminality of the judge, is, we are told, not in the opinion itself, but in the *manner* and the *time* in which it was given.

Was there any thing improper that the opinion should be reduced to *writing*? why are opinions given? surely to regulate the conduct of those to whom given; for this purpose they ought to be perfectly understood, and in no degree subject to impeachment; delivering the opinion *in writing*, greatly facilitates these objects, if therefore it was *proper* to give an opinion, it was *meritorious* to reduce it to writing, and, Judge Chase, in so doing, most certainly acted with the strictest propriety. And, unless a court of justice is bound to sit and hear counsel on points of law, where they themselves have no doubts, before they give their opinion, my honorable client could not be incorrect in delivering it at the time when it was delivered. If the opinion was *proper*, how, I pray, could any *injury* be done to Fries by its being delivered? The honorable managers say, it was intended to influence the jury. In the first place, this assertion is not supported by the evidence. When the paper was thrown on the clerk's table, not one word was said of its contents; nor did the court declare any opinion on Fries case. They only determined the indictment correct in point of form, and not liable to be quashed. They determined that the overt acts stated were overt acts of treason, if Fries had committed them, but whether Fries had committed those acts remained for the jury to determine upon the evidence; As to that part of the case the court gave no opinion. But the honorable managers have told us that Judge Chase must have known what were the facts in the case, because they had been disclosed in the former trial. And I pray you Sir, if he had that knowledge, could it *alter the law in the case*, or render the declaration of what the law was, *more improper*? But, as a new trial was granted, the judge could not know what additional evidence might be brought

forward to vary the case from its former appearance.

Nor *did*, Sir, the judge's conduct, either improperly influence, nor was it intended so to influence, the jury. No copy of the opinion would have been taken but for the conduct of Mr. Lewis, and no testimony has been offered to shew the least probability, that one single jury-man ever saw the copy, or knew one word of its contents. Nay, Sir, it is proved, that Judge Chase took *uncommon* pains to prevent any of the jurors from being prejudiced against Fries; for, although a great number of criminals indicted for sedition, submitted to the court before Fries was put upon his trial, the judge would not permit *one single witness*, who was summoned against Fries, to be examined on the submissions, least the jury, by an examination, which would have been, as to Fries, ex parte, might take up prejudices against him. This, Mr. President, was an act of the judge that carries with it the most convincing proof, that he had *no wish to oppress Fries, or to prevent him from having an impartial trial*: and *I pray that this circumstance may be deeply impressed on the mind of every member of this honourable court.*

But if the opinion had been publicly read and known, how could it have *injured* Fries? he was to have an *impartial* trial. What is the meaning of these expressions? It is a trial according to law and fact, in which, if he is proved innocent, he shall be acquitted; if guilty, convicted. If then the opinion was agreeable to law, it could not prevent, it could not interfere with his having an impartial trial. If in any case a person is acquitted, when the facts are clearly proved, and the law is against him, it must be because he has had a *partial*, not an *impartial trial.*

I again ask, Sir, ought the court, who were perfectly satisfied with respect to the law, and who considered it settled by previous decisions, in which they perfectly concurred, to have wasted perhaps several days of the public time before they gave their opinion, in listening to Messrs. Lewis and Dallas, exerting all the powers of eloquence and of sophistry, to mislead their judgment? Nor did even Judge Chase give *his* opinion, without the full consideration of the arguments of each of these gentlemen, in the very case of Fries. On his arrival, it is admitted by the managers, that he became perfectly acquainted with the proceedings in the former trial, as to the legal questions which had occurred, from the notes of judge Peters and of the district attorney; and this honourable court have had an opportunity of witnessing with what precision that gentleman takes down the substance of proceedings on a trial. Judge Chase had an opportunity of examining and considering the arguments used by Messrs. Lewis and Dallas, at the former trial, on the different legal questions then brought forward; the authorities produced, and the applicability of those authorities. He there saw every thing that the great legal knowledge and high talents of those gentlemen, indulged to the utmost extent, and heard with the greatest patience, had produced in favour of Fries. And he had the opportunity of calmly and deliberately considering the whole of these arguments and authorities in his chamber. And having done this, where would be the propriety of spending day after day in listening to the same arguments orally repeated in court, which he had read in his closet, the merit of which he had there coolly discussed, and deliberately decided?

But the managers say that this *ought* to have been done. That, though the court had no doubt of the law; and, although it is not contended but that the opinion given is correct, yet it was the *duty* of the court to have patiently listened to the counsel, and suffered them to exert all their eloquence, their ingenuity and sophistry, to pervert their judgment, and lead them into error, to prevail over their understanding, and obtain from them an erroneous opinion. And yet in the same breath, we are told by one of the honorable managers, (Mr. Campbell) that if a judge gives an erroneous opinion, the presumption is that he doth it from corrupt and criminal motives; and that on impeachment, it is necessary that he should prove the uprightness and integrity of his intentions.

Thus, then, they insist, that if a judge, intelligent, sensible, well acquainted with the law, doth not indulge counsel in their attempt to lead him into error, he is to be impeached for it. And, if the judge should listen to counsel against his well formed opinion, and by their ingenuity be led to give up his better judgment, and pronounce an erroneous opinion, he is to be impeached for that also!

Nay, it is expressly said, that the more completely the law is considered to be settled, the more absolutely necessary it is that the criminal's counsel should be permitted to argue the law to the court, and to contend against the law so settled. Thus, then, I suppose, if a person is tried for an assault and battery, the prisoners counsel must be indulged by the court, and that under pain of impeachment, in spending as much time as they please, in endeavouring to convince the court, that to come up behind an innocent inoffensive man, and fracture his scull with a bludgeon, doth not amount to an assault and battery.;—or, if a person is tried for a burglary, his counsel must also, under the same penalty, be indulged in the endeavour to convince the court, that to break into a dwelling-house in the night time, and steal therefrom, is not the offence of burglary.

But the honourable managers do not stop even here. They say, that even had Judge Chase indulged the counsel of Fries with all the length of time they might think proper, in an endeavour to pervert the judgment of the court, and their endeavour had proved unsuccessful, the court was further under pain of impeachment, after they had correctly declared the law to the jury, to suffer the counsel to take up as much more time as they pleased, in endeavouring to mislead the jury, by impudently and insolently, in the face of the court, attempting to impress them with the idea that the court, though acting under a solemn oath, and having no interest to mislead them, had given an erroneous opinion; and, to induce them to receive the law from the counsel themselves, acting not under similar obligations, but whose fame and whose fortunes might be materially benefited by deceiving the jury—from counsel whose every interest might be to pervert justice.

All which indulgence, the court, it seems, is also equally bound to give to the counsel in endeavouring to mislead the jury, and pervert justice in the cases I have before mentioned of assault and battery, or burglary, or, in reality, of any other offence, however incontestible the principles of law in such cases may be. Such are the constitutional rights, which criminals and their counsel, we are told, possess; the constitutional right, if possible, to impose upon the court; and, if they fail there, the constitu-

tional right to impose upon the jury; in other words, the constitutional right to *pervert* justice!

Nay, we are told the more manifest the guilt, the more indisputably criminal the offender is, the more necessary that he should enjoy these constitutional rights; and so it would be, if the constitution intended, as seems to be the idea of the managers, that guilt should go unpunished; since such offenders can have no chance to escape, unless justice be perverted, through the ingenuity of counsel operating upon the ignorance, the passions or the prejudices of judges, or jurors.

The managers have, consistent with the above idea, which they seem to have adopted, exclaimed, "what good could counsel do to Fries, after the court had decided the law? as to the facts there were no dispute. Under such circumstances, to assign counsel to him, was mockery, was insult."

In reply, I will admit, that Fries case was such, that counsel could not render him much service, but this was not the fault of the court, it was the fault of the case itself, it was because the law was clearly against him, and because the evidence indisputably proved, that he had committed acts, which brought him within the law.

In such cases, what is the duty of the counsel, whether assigned by the court, or employed by the prisoner? it is to advise the prisoner to plead guilty, and throw himself upon the mercy of his country, instead of taking up the time of the court, and creating expence by a jury trial; but such advice, however agreeable to the constitution of our country, would not, I admit, agree very well with the constitution of a lawyer, as thereby he might occasionally lose large fees extorted from a criminal, fed on the vain hope that the eloquence and chicanery of his lawyer might procure his acquittal, contrary to law, and contrary to evidence!

But counsel *may be* of service to a criminal however guilty he may be, and has duties which he may correctly perform; the counsel may with propriety avail themselves of any defect in the indictment or other proceedings; they may take care that the pannel of jurors are legally and impartially returned; they may direct the prisoner as to his challenges to jurors; they may take care that no incompetent witnesses are sworn, and that no improper testimony is given; they may in any questions of law, not considered settled, be heard, aud have the questions decided; in fine, they may take care that the prisoner has a *fair trial*; but when all this has been done, if agreeably to law, and clear undoubted evidence, the prisoner is guilty, it is the duty of the counsel to submit his client's case to the honest decision of the jury, without any attempt to mislead them; and this, whether the counsel are appointed by the court or employed by the criminal. Thus lawyers in Maryland are in the habit of conducting themselves in such cases, and thus ought lawyers, who respect themselves, and have a regard for their own characters, to conduct themselves in all places.

I have heard so much, Mr. President, in this case, about the constitutional rights of criminals to have counsel; and that the counsel should argue to the jury upon the true construction of the law, against the direction of the court; and, that the jury have the right to decide the law without regard to such direction; and finding also, that this article of impeachment, as well as the arguments in support of it, appear to be grounded on these principles, that I have been almost induced to suppose I

had mis-read the eighth amended article of the constitution, but on turning to it, I find that the constitution secures to the criminal the assistance of counsel, to see that his trial is fairly and correctly conducted, but has not given to the person charged with an offence, or to his counsel, if he is guilty, any constitutional rights, for the purpose of his evading punishment by the imposition of counsel, either on the court or the jury.

Whatever may have been the *practice*, I have ever considered it contrary to the *duty* of counsel, either in civil or criminal cases, to exert their abilities in attempting to procure a decision, which they are conscious is unjust. The duty of a lawyer is most certainly, in every case, to exert himself in procuring justice to be done to his client, but not to support him in injustice.

Having made these observations on the relative duties of the court and counsel, let me advert a moment to the conduct of Mr. Lewis, as appears from his own testimony. When my honourable client delivered at the clerk's table, the copy of the opinion designed for the defendant's counsel, having taken it in his hand—without opening it—without reading one word—Mr Lewis contemptuously threw it from him, publicly declaring, that "he would never contaminate *his hand* by receiving into it a *prejudicated opinion*, in any cause where he was concerned, from any judge whatever. What insolence! Would to God, no lawyer may ever *contaminate his hand* in a more *disgraceful* manner, than by receiving therein a sensible, correct, legal opinion, in a cause about to be tried, at whatever time it may be delivered to him!

He also informs us, that he declared to the court, that he never had, nor ever would so far degrade himself as a lawyer, as to argue a question of law, in a criminal case, before the court.—What arrogance! Sir, the most eminent, the most respectable lawyers both in England and America, have been in the constant habit, not only of arguing questions of law in criminal cases before the court, but in modestly submitting to their decisions, without ever considering it as lessening their consequence. I have long been at a loss, Sir, for the enmity the State of Pennsylvania has shewn for its bar, and the desire of its citizens to get rid of their lawyers; but if such is the manner, in which the lawyers conduct themselves to their courts—if they, when they are employed in a cause, claim the constitutional right, uncontrolled by the court, instead of furthering justice, to pervert it; I wonder no longer why the citizens of that state wish to be freed from them. And will readily join in the sentiment, "the sooner the better." I will go further, and say, if their courts submit to such conduct, and think themselves bound to be the *passive* witnesses of such perversion of justice, it is not much matter how soon they also get rid of their courts, for they might as well be without them.

The principles, which have been advocated in support of this article, are subversive of the whole order of things; instead of lawyers being the officers of the court, subject to their control, and amenable for the propriety of their conduct; the judges must be the menial, degraded instruments of the lawyers, and must suit their conduct, not to propriety and justice, but to the pleasure of any haughty overbearing lawyer, possessing abilities and popularity, and that too under the hazard of being impeached and turned out of office, if his principles should, on any occasion, render him

restive, or, in the language of the testimony, if he should "take the stud."

And here, Mr. President, I hope I shall be indulged with some inquiry as to this "prejudicated opinion;" *which* Mr. Lewis seems to think has such a contaminating, polluting tendency to the hand of a lawyer, and of which he was so apprehensive, that he would not retain it for a moment. I confess, I feel myself here at a loss to know exactly what the witness meant by a "*prejudicated opinion*" on the law. I should suppose that the expression, if it can in any instance be correctly applied, must mean the same as to prejudge the law; which, if used to signify any thing improper, must be confined to the case where a person forms an *erroneous* opinion of the law, without using *all due means* to acquire correct information.

To *prejudge* any case, I consider as meaning, that a person without competent knowledge of facts, hath formed an opinion injurious to the merits of the case. If the term, prejudication, is used in this sense, there is no pretence that my honorable client gave a *prejudicated* opinion in the case of Fries; for it is not alledged that the opinion given, was not strictly legal and correct. Neither Mr. Lewis nor Mr. Dallas have ever attempted to hazard their characters by suggesting the contrary, nor have the honorable managers taken that ground; they do not contest its propriety. Should they in their reply, I shall cheerfully rest that question upon the well known legal abilities of Judges Iredell, Paterson, my honorable client, the associate judges, who concurred with them, and the legal knowledge of this honorable court.

But if by a prejudicated opinion, is meant, that the judge, from his great legal knowledge, and familiar acquaintance with the law, as relative to the doctrine of treason, particularly levying war against the United States, had formed a clear decided opinion that the facts stated in the indictment against Fries, if proved, as laid, amounted to treason, I will readily allow that I have no doubt my honorable client had *thus* prejudicated the law, not only before Fries was brought to trial, but before he had committed the treason for which he was tried. But if this manner of prejudicating law, is thought improper, nay, criminal, in a judge, a prejudication, which is nothing more than an eminent and correct knowledge of the law, why I pray are gentlemen of great talents, and high legal attainments, sought for in your appointments of judges? how, Sir are they to free themselves from this obnoxious prejudication of the law, and acquire the contended fitness for the trial of a cause, but by forgetting all that legal knowledge, which had been a principal inducement to their appointment? If I understand the gentlemen, to gratify their ideas, we ought to have judges, who, when they take their seats on the bench to preside at the trial of a criminal, should not have one single legal idea relative to the offence about to be tried, but should have their minds exactly in that state, in which, some ingenious metaphysicians tell us, the human soul is, when first united to the body, like a pure unsullied sheet of white paper, ready to receive any impressions, which may be made upon it.

Well, be it so, and let us consider the trial of Fries as if it had been conducted on that principle. The judges, with their minds like this white sheet of paper, were to sit still, and suffer the counsel to scrawl thereon whatever characters they pleased,—to blot and to blurr it,

until they were perfectly satisfied. After this ceremony, the judges, examining the impressions thus made upon the antecedent clear sheet, were from these, and these *only*, to form their opinion of the law. And this opinion, having been thus formed from nothing but what occurred *during* the trial, and *after* the jury were sworn, would not be called a prejudicated opinion, and therefore I presume would be perfectly satisfactory to the honorable managers. So far we should have done very well as it related to the trial of Fries. But next day another criminal is to be tried for a *similar* offence; Messrs. Lewis and Dallas are not his defenders. Getman has selected Mr. Tilghman for his counsel. How, I pray you, are the judges to be qualified to preside with propriety in this trial? yesterday they gave a solemn determination in Fries case upon the *same* question of law which now must come forward in the case of Getman. Mr. Tilghman was not then heard. The opinion, then given, is, as *to Mr. Tilghman and his client*, as much a prejudicated opinion, an opinion as contaminating to the hand of a lawyer to receive, and as highly criminal for a court to give, as was the opinion given by my honorable client. What can be done? the minds of the judges are *no longer a pure unsullied sheet of paper*. Yesterday, in the trial of Fries, they had been scrawled upon and sullied by Lewis and Dallas; the impressions still remain. I, Sir, can think of no remedy in this difficulty, except that the judges should be supplied with a reasonable quantity of *India rubber*, or something which shall answer in its place, with which they might wipe off and erase every impression which had been made the day before by Lewis and Dallas, during the trial of Fries. And thus *once more* take their seats on the bench, for the trial of Getman, with minds again like clean sheets of white paper, ready to be again scrawled over, again to be blotted and blurred, at the pleasure of Mr. Tilghman, and from these scrawls, blots and blurrs, and from these *alone*, to take their impressions as to the law, and form their decision as to Getman's case, without regarding, or even *remembering* the decision they had given the day before. And in this manner to proceed in every case that might come before them successively in their judicial capacity!

If, Sir, judges are to be censured for possessing legal talents, for being correctly acquainted with the law in criminal cases, and for not suffering themselves to be insulted, and the public time wasted, by being obliged to hear arguments of counsel upon questions which have been repeatedly decided, and on which they have no doubt; I pray you let not our courts of justice be disgraced, nor gentlemen of legal talents and abilities be degraded by placing them on the bench under such humiliating circumstances! but let us go to the corn-fields, to the tobacco plantations, and there take our judges from the plough, and the hoe. We shall there find men enough possessed of what seems to be thought, the first requisite of a judge, a total ignorance of the law! That degradation, which *no gentleman* of merit and abilities *could endure, they will not feel.*

In reply to an observation made by my very respectable colleague who opened our defence, and which I have endeavored to enforce, "that, if the opinion given by the court was correct, Fries could receive no injury thereby, though Messrs. Lewis and Dallas had not been suffered to argue against that opinion, because the opinion ought, notwithstanding, to

have been the same. One of the honorable managers hath said, that had Judge Chase sentenced Fries to death without the verdict of a jury; had he decided the fact as well as the law; and he says he might have done the one with as much propriety as the other, it might, have been urged in the same manner in defence of the judge, "that it was of no consequence to Fries, for the fact being clearly against him, had he been tried by a jury, the jury must have found him guilty, and then the judge must have done what he did, sentence him to death."

This argument is totally fallacious. By the constitution and the laws of the United States, the criminal has a right to demand that the *facts* shall be decided by a jury. This the court cannot refuse if the criminal requires it. Was a judge to refuse the criminal the trial of the fact by a jury, he would violate a well known legal and constitutional right of the criminal. But as the criminal has a right that the jury should determine questions of fact, so do the principles of jurisprudence equally declare it to be the right of the court to decide questions of law; and the constitution in no part, contravenes this right; it no where says that the judges must be ignorant of the law, and take their impressions from the counsel of the criminal, or that it is the right of counsel to be heard where the court has no doubt of the law, or to argue to the jury that the law is contrary to the direction of the court, or that the jury should have a right to decide the law contrary to such direction. Hence, therefore, there is this great distinction between the two cases; in the first the court only exercise their own rights, infringing no right of the criminal; while in the last, the court would act in direct violation of his well known legal and constitutional rights. But though the criminal has the constitutional right to have *all facts* decided by a jury, he may wave this right, in which case the court may pass sentence without the intervention of a jury, as where the criminal demurs to the indictment, and rests upon his demurrer, or where he pleads guilty, in which cases, the court, without the intervention of a jury, proceed to pass sentence according to law, and the nature of the offence.

In the opening of our defence, it has also been urged, that if there was any impropriety in the conduct of the court, respecting the trial of Fries, on the first day, it was amply compensated for by the conduct of the court on the second day, in having called in the written opinions, and the copies which had been taken, and giving the counsel liberty to proceed in such manner as they should think proper.

In answer to this the honorable managers have replied, that it was then too late. The mischief, that had been done the first day, was irretrievable; the sin, that day committed, was inexpiable: Nay. one of the managers has told us, that the excuse is as absurd, as would be the excuse of a person, who, having thrown a firebrand into combustibles, and set the whole neighbourhood in a blaze, should attempt to excuse himself by saying "he had again got into his possession, and extinguished the brand, with which he had enkindled the fire, although the conflagration was still extending, and consuming every thing before it;"—a most happy simile.

But let us examine wherein was the mischief so irretrievable—the sin, so inexpiable? neither more nor less, than in this, that, as the written opinion only contained the

impressions on the minds of the judges, the destruction of that written opinion would not prevent the same impressions remaining on their minds; and those impressions would be as difficult to remove, after the opinions were called in, as before. 'Tis all very true; but how came the judges to have on their minds those impressions. Not from having committed them to paper, but from their correct knowledge of the law. And how were those impressions to be removed? certainly by no means, unless that correct knowledge of the law could also be removed. To accomplish which, I know of no means that could be used, unless the judges could have been supplied with a quantity of our *India rubber*, or with a few barrels of the waters of Lethe, with the one to rub out and efface from their minds all their legal knowledge, or by copious draughts of the other, to wash it away. But, Sir, *I* have not made, nor shall *I* make any use of the proceedings of the second day as an excuse for any impropriety of the court on the first; I only consider them as incontestible proofs, that the court had no other object in view, on either of those days, than conscientiously to discharge their duty, by giving Fries a fair and impartial trial, that if he was guilty he might be punished—if innocent, acquitted. I deny that the court was guilty on the first day, of any impropriety; I take higher ground, and have contended, and do contend, that the conduct of the court on the first day, was correct and proper, and during the whole trial I find nothing improper in their conduct, except their almost humiliatingly soliciting the counsel of Fries to do their duty, instead of committing them to gaol for the impropriety of their conduct, which the court ought to have done; but even in this, the court has afforded the strongest proof of their solicitude that Fries should have every legal and constitutional benefit of counsel at his trial.

Reflect, also, that at the time when Mr. Lewis thus contemptuously dashed from his *pure hand* the *contaminating* opinion, he had not read a single word, nor received the least intimation of its contents, nor did he know its contents until long after; and yet he instantly formed the determination not to appear for Fries, and to advise their client not to accept the assignment of any other counsel, should the court offer it. Whence this conduct? how did he know the opinion was not favourable to his client? his conscience told him it was not. His own great legal knowledge confirmed to him the truth. He well knew the law; he was acquainted with the correct decisions which had been before given. He well knew the great legal knowledge of the judge, who on this occasion presided; he was certain my honorable client could not but concur with his brethren. He acknowledges they had no hope to change the opinion of the court, and that they had not the vanity to suppose the jury would, under their influence, decide the law contrary to what the court should direct; therefore that they had no hopes of the acquittal of their client by the jury on the trial, whatever services they were permitted to render him; and therefore, as the only chance, which they had to save his forfeit life, they assumed that line of conduct, which has been disclosed in the evidence. When Mr. Lewis, in giving his testimony, mentioned "Judge Peters asked us on the next day whether if the court had got into a scrape the first day, the counsel would not let the court get out of it." "No," said Mr. Lewis, "we were determined not to let

them get out of it, as the only means to save our client's life," and in the conclusion of his testimony, he repeated that they were actuated in their conduct, from considering it the only chance they had to save the life of their client, and not from any other motive. And Mr. Dallas also observed in his testimony, that when the court, on the second day pressed them to continue their services as council of Fries they refused, determined not to depart from the policy they had adopted, and to withdraw, as the most probable means of benefiting their client.

I shall conclude what relates to this article by observing, that the conduct of Fries's counsel to the court, on that trial, was such as nothing can excuse. It can only be palliated by the reflection that for his crimes he was liable to suffer death. Feelings of humanity and compassion, independent of interest, might excite in their bosoms an earnest anxiety to save his life, this may serve to mitigate censure; but even those feelings, however amiable, ought not to be gratified at the expense of national justice nor by an endeavor to stamp upon judges of uprightness and integrity the dishonorable charge of partiality and oppression. I fear, Sir, I have been tedious on this article; but it will be considered, that, whatever may be my own sentiments of the futility of any part of these charges, I cannot determine how far this honorable court may correspond with me in sentiment. Nor can I do otherwise than treat, as of consequence, any charge brought forward by the honorable house of representatives, or not consider it as being of importance.

I will now, Mr. President, proceed to those articles which arise out of the trial in Virginia; and I find it stated in the beginning of the second article, that my honorable client went there prompted by the same shameful spirit of persecution and injustice; the truth of which I am ready to acknowledge, after having satisfactorily proved that at Philadelphia he had not shewn in any manner whatever a spirit of persecution and injustice, but had acted with uprightness and integrity; and that his greatest fault, on that occasion, was, that he did not commit the counsel of Fries to the public gaol for their insolent, their arrogant, their contemptuous behaviour to the court: and I flatter myself that I shall be able to shew that my honorable client acted with the same uprightness and integrity in the case of Callender as I have shewn he acted in the case of Fries.

The second article goes on to charge Judge Chase with over-ruling the objection of John Basset, who wished to be excused from serving on the jury in the trial of Callender, and causing him to be sworn, and to serve on the said jury, by whose verdict Callender was convicted.

This article requires a discussion of the law relating to challenges of jurors —and whether Mr. Basset was legally sworn on that jury.—And here again as well as in the case of Fries, I meet with the most perfect novelties, for except in those trials I never heard of jurors, when called to be sworn, examined on oath whether they had formed;—or formed or delivered, or whether they had formed and delivered, an opinion on the subject about to be tried.—And here also let me observe that there is no just grounds for the charge that judge Chase from partiality administered the oath differently in Callender's case from the manner in which he administered it to the jurors in the case of Fries, for Mr. Rawle, referring to his notes taken at the time, hath told us that in the case of Fries, one or two of the first jurors were only asked whether he had formed an opinion; after which the question was put, whether he had formed *or* delivered an opinion, but ultimately the

question asked was, whether they had formed *and* delivered an opinion, which question was put to the greater part of the jurors ; so that the interrogatory *ultimately* fixed upon in the case of Fries is the same which was put to all the jurors, who were interrogated in the case of Callender.

I have, Mr. President been in the practice of the law for thirty years.—Before the revolution I attended, two or three years, the two counties on the Eastern Shore of Virginia—Sussex county in Delaware—and Somerset and Worcester in Maryland, since the revolution I have constantly attended the general courts on the Western and Eastern Shores of Maryland, and the civil and criminal courts of Baltimore county—and for about six years several other counties in Maryland.—In the whole course of my practice, I have never known a single case either civil or criminal, in which the jurors have been, when called to the book, demanded to answer upon oath either of the aforesaid questions which the defendants counsel requested to be put to them.

If either party choose to challenge a juror for favor, on account of declarations made by the juror, the only ground for it is that he has used expressions shewing his determination to decide for one party or the other without regard to truth and justice. In which case the party makes his objection to the particular juror, specifying the expressions uttered by the juror indicative of such improper determination, and produces witnesses to esablish his objection ; for the juror cannot be examined on oath to substantiate the charge—and, unless by mutual consent, the objection made must be decided, not by the court, but by *Triers*. And the only matter to be decided is whether the juror has made any declaration, of a design to give a verdict one way or the other, whether right or wrong, for if the juror made the declarations from his knowledge of the facts in the case, this would be no cause of challenge, nor any objection to his being sworn on the jury. And as the juror himself against whom such objection is made cannot be examined on oath, it follows of course he cannot be challenged for having *formed* an opinion, but only for having *delivered* it, as *third* persons cannot know of an opinion being formed but by its having been delivered. And as I have observed already, even the delivery of an opinion is no cause of challenge, if it appears to have been founded upon the jurors knowledge of facts, and not from partiality —in consequence of this principle of law, it can be no objection against a juror being sworn, even though, he should have the most perfect knowledge of every fact relative to the issue, to try which he is about to be sworn ; —on the contrary, the principle reason assigned why trials ought to be by jurors from the *vicinage* is the presumption that they will be best acquainted with the facts which will be put in issue for their decision.

Suppose a person, summoned as a juror to try an indictment for assault and battery or any other offence, had seen the offence committed and perfectly knew the offender, it would be no cause of challenge against the juror, nor could he for that reason be rejected at the trial—on the contrary the law considers him the better qualified to serve in that case as a juror in consequence of that knowledge. If in the instance I have put, such juryman had declared that the criminal had committed an assault and battery, and that he was determined to find him guilty, this declaration being founded on the knowledge of the juror as to the truth of the case would be no ground for challenge—to support a challenge, the juror must shew an intention to act partially through favor or malice. It

is therefore no objection to a person serving as a juror because he is also a witness.

And so far is it from being the case that a juryman's knowledge of the law, or his having declared his opinion of the law arising in the case to be tried, should be a cause of challenge, that, if two or more persons are indicted in the same indictment for the same offence, and one is tried and convicted, a juryman, who served on that trial may be sworn on the subsequent trial of the other person joined in the indictment, and cannot be challenged, although as to the law arising in the case he had not only declared his opinion, but even declared it on oath in the former trial. So also, is the case of a judge, whether he is to decide the law only, as in jury trials, or the law and fact both, as here in the case of impeachments;—his knowledge of the facts in the cause is no objection to his acting as a judge, and he may be called on to give testimony, and yet give his decision in hisj udicial capacity.—In support of these principles in addition to the authorities adduced by my very respectable colleague (Mr. Key) I will trouble this honorable court with Brookes abridgement Title, Challenge pl. 90, where he says, it is a cause of challenge to the favor if the juror has declared that should he be empanelled he would give a verdict for the plaintiff.

This authority shews that a *declaration*, as I have contended, must have been made: but I shall now also shew, that as I have before stated, the declaration must be made from motives of partiality, that is, from favor or ill-will, to the one or the other party.—For this purpose I will read 2d Hawkins, chap. 43 sec. 28. "It hath been allowed a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion before-hand,, that the party is guilty, or will be hanged, or the like. Yet it hath been adjudged, that if it shall appear the juror made such declaration from his *knowledge* of the cause, and not out of any *ill-will* to the party, it is no cause of challenge.' — This doctrine is as old as the seventh of Henry the sixth; during whose reign it was determined, that though a juror had said twenty times, that if he was sworn, he would give his verdict for one of the parties, yet if he said this from the knowledge which he had of the matter in dispute and the truth of the case, such juror was *indifferent*; but if he said this from any affection to the party, the juror in that case was *favorable*, and thus judge Babington directed the Triors; see Brooke's abrid. Title, Challenge. pl. 55.

In Viners abridgment 21st vol. page 266 we find the same principle recognized. It is there stated that "if a juror says twenty times that he will pass for the one party, this is not a principle challenge, for it may be that he speaks it for the *notice* which he has of the thing in issue, and not for affection."—A Decision in the seventh of Henry sixth, and another in the twentieth of the same king are referred to; and the authority from Brooke, Challenge, pl. 55. before mentioned, is in the note introduced with approbation.

In 2d Hawkins Cap. 43 sec. 29, we find in confirmation of the positions I have taken, the law thus declared. "It hath been adjudged to be no good cause of challenge, that the juror had found other persons guilty on the same indictment, for the indictment is in judgment of law several against each defendent, for every one must be convicted by particular evidence against himself." The same principle is established by the decisions in 4th vol. State Trials, pages 141, and 175, (which he turned to and read,) 2d vol. State Trials 255 256, also shew that though a person is a witness in the cause, it is no reason he should not serve as a ju-

ror, and also that the knowledge which a juror may have of the case to be tried by him, is no disqualification—It also shews how questions of this nature are to be tried.

And to prove that the knowledge of the facts to be decided doth not in any degree interfere with the right of a judge to decide in the case, and that any member of this honorable court might be sworn as a witness and yet give his decision in the cause, I will read an authority from State Trials, vol. 2d, page 632, where Lord Stafford on his trial, puts this question to the court, "if I shall name any of the house of lords as my witnesses, can that exempt them from being judges"—The answer given by the lord high Steward was "no my lord, if your lordship has any witnesses among my lords here, they may well testify for you, and yet remain still in the capacity of your judges, for my lord of Stafford had a great many witnesses, who were peers."

Thus, though in this instance the judges had to decide both the law and the fact, the knowledge of any one of them in no respect formed an objection to his deciding as a judge.

I have said also that a juror cannot be examined on oath to prove that he has made any declaration which would be a good cause to challenge him for favor. To support this position, I will trouble the honorable court with two authorities.—The first, from Leach's Edition of Hawkins 2d vol. page 589 in the note.—In the Text it is mentioned as a cause of challenge, "that a juror has said the prisoner is guilty or will be hanged or the like, &c." In the note it is stated that the prisoner shall not examine a juror concerning such matter on a voir dire, because it sounds in reproach.

The second, from Cooke's case 1 salk 153, where it appears that Cooke being indicted for high treason, offered to ask the jurors when called, in order to challenge them, "if they had not said he was guilty, or would be hanged." And, by the court; this is a good cause of challenge, but then the prisioner must prove it by *witnesses*, not *out of the mouth of the juryman*.

With these observations I shall rest the question as to what disqualifies a juror, and shall proceed to examine whether Basset was improperly or illegally sworn upon that jury which tried Callender. I have shewn that he might not only have formed, but delivered an opinion respecting the conduct of the criminal, and yet that unless his declarations tended to prove that he did not mean to give a just and impartial verdict, but to decide against propriety and right, he was competent to be sworn on the jury. The question which was put to the jurors by the court, no law required to be put, nor was any of the jurymen bound by any law to answer the question—and the judge was perfectly correct, when he said, upon the counsel insisting that the indictment should be read to the jurors, and that they should then be asked if they had formed or declared an opinion as to the charge in the indictment, that the court had already indulged them beyond what they were entitled to by law.

But to proceed with Basset.—What was his situation? He expressed no wish to be excused, provided there would be no impropriety in his being sworn, but from a delicate scruple he informed the court, that he had seen in the news-papers, extracts said to be taken from The prospect before us; that he had no knowledge whether they were truly extracted, but if they were, and the context did not explain away the apparent meaning of the extracts, he had made up his opinion unequivocally that their author came within the provisions of the sedition law. But let us suppose that Mr. Basset had actually seen and

read The prospect before us, and had found the extracts fairly taken from it, and had formed and declared his opinion, that it was a publication which came within the sedition law ;—as to Callender, it would have amounted to no more than this, that if he was the author or publisher, and could not prove the truth of his charges, and had published them maliciously, to defame the President of the United States, he ought to be punished. And what honest man ever thought differently ?—None, whom I ever heard speak of the book. Whether the extracts he had seen agreed with the contents of the book—whether the context supported the apparent meaning—whether the charges were true—whether Callender was the author or publisher—and if so, whether he wrote or published them maliciously to defame, &c. were subjects of which Mr. Basset was ignorant, and on which he had declared no opinion. On these questions he was at liberty freely to decide according as the evidence in the case should justify him.

But it is said, this opinion formed, and declaration made, was improper, because they say the criminal ought to have the law and the fact both decided by the jury ; and a juror should have his opinion as little made up on the law as on the fact. Hence then, we are to infer, that as want of knowledge of the law is the best qualification for a judge, so the ignorance of the law is the best qualification for a juror : and yet we are told, that a juror has a constitutional right to determine the law, and that too, in defiance of the opinion of the court ! Thus, it seems, the more ignorant they are, the greater our security for obtaining a just decision ! I admit, the greater their ignorance, the better will they be qualified for taking what is contended to be the *due* impression from the exercise of what we are told is the *constitutional* right of counsel!

But in this case, as appears from the testimony, there were others beside Callender concerned in printing and publishing The prospect before us ; suppose some other person, for instance Mr. Rind had also been indicted,—that on the trial of Rind Mr. Basset had served as a juror, and had found him guilty ;—that Callender had afterwards been brought to trial, and Mr. Basset had been called as a juror, he could not be set aside according to the authorities I have produced, although in the case of Rind he had, and that on oath, declared his opinion of the law.

Mr. Basset, although being possessed of a liberal fortune, he doth not now practice, was bred to the law ; his legal knowledge was such that he could not doubt but that such publications as The prospect before us came under the provisions of the sedition law.—And it is, for this reason, that the managers contend he ought not to have been sworn. Yes sir, this very knowledge of the law which rendered him a more proper character to serve on the jury, is by the honorable managers insisted on as what ought to have been his disqualification ! And yet they contend that the jury have the uncontrolable right to decide upon the law !

Suppose Mr. President, a person to be indicted for an assault and battery —or for burglary—if any person should be summoned on the jury, who had so much common sense and general information as to know that the man who comes behind the back of another and knocks him down is guilty of an assault and battery, he would be unfit to serve as a Juror in the first case ;—or to know that if a man breaks into a dwelling house in the night time and steals therefrom, such offender is guilty of burglary, he would be equally unfit in the last case.

Hence then it follows, that in the opinion of the honorable managers, that as judges ought to have no previous

knowledge of the law relative to cases which are to be tried before them;—so also, jurors ought not to have any knowledge of what is the law, in cases to be tried before them; and that if any juror with such legal knowledge should be summoned he ought not to be admitted to serve, unless indeed he can be rendered properly qualified by the application of the *India Rubber*, or by the use of the *Lethean waters*, by the one mode or the other to be reduced to that happy state of ignorance thought by the managers to be the essential requisite of a juror.

I would before I conclude this subject, remark upon an observation made by one of the honorable managers, (Mr. Campbell) he has charged judge Chase with having caused Mr. Basset to be sworn as one of the jury for the very purpose of convicting Callender, from his knowledge of Basset's political principles.

My worthy colleague (Mr. Key) has with great strength of argument shewn that judge Chase could not from the facts proved, be otherwise than a stranger both to the person and to the political principles of Mr. Basset. But I am aware that in reply it will be said the declaration Mr. Basset made in court shewed what were his political sentiments.—He only there declared that The prospect before us, if the extracts he had seen were justified by the book was a seditious publication——This could be no proof that he was a federalist.—I never knew a gentleman of any political principles that did not uniformly declare, that if the sedition law was constitutional, that publication was clearly within the provisions of the law. Even his counsel have declared that they did not appear on his account, that they despised the wretch, and considered him as a disgrace to society.—They have declared they had no hopes of saving him unless by establishing the unconstitutionality of that law.

But even had judge Chase known the political principles of Mr. Basset, to have been federal, it would not have justified him in excusing him from being sworn—Nor would he have been justified in setting aside a juror because he was a republican, unless there had been in each case some other legal objection. There is no distinction between the two cases—the political principles of a man is not the test of his fitness to serve as a juror. If Mr. Basset had been exempted from being on the jury in consequence of the scruples he suggested, the court must have exempted all who should make similar excuses, or they would have given just cause for complaint. It was the duty of the court to direct the jurors to be sworn as they were called, against whom there was no legal objection—I flatter myself I have sufficiently shewn that against Basset there was no such objection—that the judge was not only free from impropriety in directing him to be sworn, but that his conduct would have been censurable had he acted otherwise; and here, sir, I conclude my observations upon the second article of impeachment.

I now come, Mr. President, to the third article, wherein my honorable client is criminally charged for the rejection of the evidence proposed to be derived from Col. John Taylor.

In this part of the case the facts are admitted. The next question of law, therefore, which presents itself for discussion, is whether or not Col. Taylor's evidence ought to have been received, or was properly rejected. Here again I must observe that the honorable managers to support their charge, resort to principles which are to me, to the last degree, strange and novel.—We are told that the court has no right to order questions which are meant to be put to a witness, to be reduced to writing. Nay, that the court have no right to know what evidence is meant to be

given by the witness, or its connexion with other testimony, or its bearing on the cause, but to receive it drop by drop, as the counsel think proper to deal it out. In answer to these extraordinary ideas which we have had thus introduced, I must be permitted to assert, that the court have, in my opinion, an undoubted *right* to require of the counsel that they should open their case, explain the nature of the evidence meant to be given, and on the production of a witness, state what they expect to prove by such witness. In the course of my practice it has been the usual method of proceeding for counsel to conduct themselves in this manner —And on this subject, M'Nally, in his rules of evidence, page 14, expressly lays it down as a *rule*, "that counsel ought not to call a witness without first opening to the court the nature of the evidence they intend to examine to. This has been *often solemnly adjudged*, though not *strictly adhered to in practice*." And in page second he gives us as the *first* rule, "that no evidence *ought to be admitted* to *any point* but that on which the issue is joined.' But how is a court to prevent, and it is only the court which can prevent, evidence being admitted which is not pertinent to the point on which the issue is joined, unless they are first informed what evidence is meant to be given? It is then upon the authority of M'Nally established, that the court have the legal right to know what counsel mean to prove by a witness—and having that right, they may exercise it whenever in their discretion they may think it necessary.

To determine, therefore, whether they acted correctly in rejecting the testimony of Col. Taylor, let us examine what testimony they hoped to obtain from him; and for this purpose, what were the questions proposed to be put to him. They were,

1st—Did you ever hear Jno. Adams express any sentiments favorable to monarchy, or aristocracy, and what were they?

2d—Did you ever hear Mr. Adams, while Vice-President, express his disapprobation of the funding system?

3—Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain?

Col. Taylor's testimony was offered as being relevant only to one set of words stated in the two counts of the indictment, to wit, "He (meaning the said President of the United States) was a professed aristocrat. He (meaning the President of the United States) had proved faithful and serviceable to the British interest; (inuendo) against the interest and welfare of the United States."

Need I state to this honorable court, that words, which do not in themselves, or on the face of them, purport any thing criminal, cannot be made so, or considered as libellous, but by laying an *innuendo* giving them a criminal meaning, without which they would be innocent,—and also that the criminal meaning laid in the innuendo must be strictly proved.

Let us now examine the set of words to which Col. Taylor's evidence was meant to apply, they were without any innuendo, as follows, "He was a professed aristocrat, he had proved faithful and serviceable to the British interest."

This sentence consists of two separate distinct clauses or parts; the first, that "he was a professed aristocrat"—. The second, that "he had proved faithful and serviceable to the British interest." I ask this honorable court if either of these clauses or parts, of themselves, and without an innuendo, carry with them any charge of crimi-

nality, or any thing libellous? To say that a man is an aristocrat, a democrat, or a republican, is not of itself charging the person with any thing criminal, nor is it slanderous, unless indeed the charge is accompanied with an innuendo, stating that by the epithet so *used*, something very bad was intended; and *that* government would indeed merit contempt in which a person should be punished upon such a charge. So also, to say that a man had been faithful and serviceable to the British interest charges him with nothing criminal, and therefore cannot be slanderous, because the British and the American interest in many instances have been and may be the same.

There may be a variety of instances in which the interest of two nations may concur. There have been many in which the interest of America and of Britain did concur; many also in which the interest of America and France have combined. In the first instance a man may have been faithful and serviceable to Britain; in the other to France, without the violation of any duty to the United States, without having been guilty of the least criminality.

The sentence then taken altogether connecting the two clauses, do not of themselves import any thing criminal, and consequently is not slanderous, if it remained without any innuendo,; and if it was free from an innuendo being not slanderous, would not require any evidence relative thereto—Nay, it would be no part of the charge put in issue, for in legal construction it is only such part of the publication stated in an indictment which is slanderous that is the point in issue.

I will now, sir, read that part of the indictment, in connection with the innuendo. "He (meaning the President of the United States) was a professed aristocrat." Here there being no innuendo, this clause or part of the sentence remains in its primitive innocency;—"He (meaning the President of the United States) had proved faithful and serviceable to Great Britain." This of itself, as I have observed, is perfectly innocent; but here comes the innuendo with its sting in its tail—"Innuendo, against the interest and welfare of the United States of America." Thus it was only the *latter* clause in the sentence that was presented as being libellous; and how was that part of the sentence to be justified? By shewing that the President had, in the high station he had occupied prostituted his character by sacrificing the interest of the United States to the interest of Great Britain. And how was this justification to be proved? Not by any answer Mr. Taylor could give to the *first* question, for that as far as his answer could have relation, could only relate to the first clause; but that clause being of itself inoffensive, and not made criminal by any innuendo, was no part of the *criminal charge in issue*, but was merely introduced as being part of a sentence, the latter clause of which was only charged to be criminal. Any evidence from Col. Taylor as to the first clause was therefore totally irrelevant, as not going to the point in issue, and as only going to prove the truth of what was neither stated nor relied on as being criminal; and therefore was properly rejected by the court.

As to the second question, to wit, "Whether Mr. Adams, while Vice-President, had expressed his disapprobation of the funding system?" The question could not be in any degree relevant to the one or the other clause in the sentence—Whether Mr. Adams expressed his disapprobation while he was Vice-President, of the funding system, or not, could in no respect go to prove or disprove his being a professed aristocrat, or his having sacrificed the interest of the United States to the interest of Great Britain. The court therefore considering this ques-

tion totally irrelevant to the "point in issue," did as was their duty to do, they refused to suffer it to be put to the witness.

So much for the two first questions. We now come to the third, respecting the votes of Mr. Adams, when Vice-President, against the bill for the sequestration of British debts, and the bill for suspending intercourse with Great Britain. For the conduct of my honorable client in refusing to permit this question to be put to col. Taylor, two reasons may be assigned; the first, that if the fact was as stated, it could not be proved by col. Taylor. The second, that if the fact was established, it would be totally immaterial to the issue:—Col. Taylor's evidence was not the best which the nature of the case admitted. I will not say that the traverser, in order to prove this vote, was under the necessity of procuring a copy from the journal of the senate, properly authenticated by their clerk, but he certainly ought at least to have produced a printed copy of the votes and proceedings of the senate as published by them. One thing at least is certain, that the traverser could not consistently with rules of law, give parole evidence to establish the vote of Mr. Adams, and therefore that col. Taylor could not be legally examined on that subject. But I will go further in defence of my client, and will say, that if they had had the best possible evidence of the fact; if they had had an attested copy from the records of the senate, the judge would have departed from his duty if he had permitted the evidence which was wished to have been obtained from col. Taylor, to have been given to the jury. Ought any evidence to be given to a jury which is not proper and pertinent to prove the *fact in issue*, or to prove some fact from which the fact in issue *ought* legally to be *inferred*—evidence not relevant to the point before the court and jury?—Was not, as to this part of the charge, the fact in issue, whether Mr. Adams had swerved from his duty by intentionally prostrating the interest and welfare of his country to the interest and welfare of Great Britain?—Should not a charge of so atrocious a nature be proved by some direct act of this criminal sacrifice of the interests of the United States to the interest of Great Britain, or by proof of some other act from which such criminal sacrifice must and ought on principles of law to be clearly and necessarily inferred? And what was the proof proposed to be offered for this purpose? That upon the question whether British debts should be sequestered, and whether our intercourse with Great Britain should be suspended, after full discussion one half the members of the senate voted in favor of those measures, and one half of the senate against them—And that in this situation Mr. Adams thinking the measure of too hazardous a nature, and one which might involve our country in a war, did not choose to take upon himself so great a responsibility as to give his casting voice in the affirmative.

I have, Mr. President, neither time nor inclination to enter into a discussion of either the propriety or policy of those measures, but I have no hesitation to express my belief, that the honorable members who voted for or against those measures, were equally actuated by the same purity of motive. That those who voted on the one side or the other acted from the sincerest desire to promote what they respectively considered the best interests of their country.

Shall, then, the rejection of the evidence that Mr. Adams, on a measure in *fieri*, on which the senate was equally divided, gave his casting vote with the senators whose political sentiments

accorded with the then majority; and which evidence, if admitted, would have proved nothing, be considered as a ground of impeachment! I say evidence, which, if admitted, would have proved nothing; for that act of Mr. Adams certainly would not have proved that he had corruptly and wickedly sacrificed the interest and welfare of the United States to Great Britain; nor would it have proved any thing, from which such sacrifice ought legally and necessarily to be inferred. Where is the man who would dare to say, that the members of the senate who voted for or against the bill for sequestration of British debts, and the suspension of our intercourse with Great Britain, acted from corrupt motives? Is there a member of this honorable court, who believes that the senators who voted against those measures were actuated by a desire to promote the interest of Great Britain at the expence of their own country? Or that those who voted in favor of those measures were actuated by a desire to promote the interest of France at the same expense? The heart of every member of this honorable court, I am confident, revolts at the idea! Ought then any judge to have suffered this act of Mr. Adams to have been offered to a jury, as evidence directly to establish that he had wickedly and corruptly preferred the interest and welfare of Great Britain to that of the United States, or as evidence from which the jury ought, upon legal principles, necessarily to infer that he had thus acted.

The judge who would have permitted such evidence to have been given for such purpose, in my opinion, ought much rather to be impeached for his conduct, than the judge who should reject it.

It is the sole province of the court to determine what evidence shall go to the jury, either as proper, directly to prove the fact in issue, or to prove any facts from which that fact ought to be inferred. The court are the sole judges of the competency and admissibility of the evidence—the competency depends upon its legality; the admissibility upon its relevancy to the question in issue—If illegal, it is their duty to reject it; but though legal in its nature, yet if not relevant to the point in issue, it ought equally to be rejected; because its production only wastes time, and has a tendency to mislead the jury.

The right of the court to decide what evidence shall go to the jury I never heard questioned till in the course of this trial. The honorable managers appear disposed to advocate a different doctrine, and as they claim the right that the jury should decide the issue without regarding the opinion of the court as to the law, so they seem to think that the court ought not to restrict the evidence to the jury—And hence they have expressed some indignation against my honorable client, because when he told the counsel in Fries case, that they might go on as they pleased, but still subject to the direction of the court as to what evidence they might offer:—On that occasion they exclaimed—"The court took upon themselves to decide what evidence should go to the jury! But perhaps that evidence which might have been rejected might have influenced the decision of the jury, & as the jury have a right to decide the law, uncontroled by the court, they ought to have before them all that evidence which might possibly influence their decision!" Charming doctrine! Thus the jury are not only to decide the law on the issue, but likewise all questions of law which arise upon the proceedings in the cause and upon the evidence that is to be admitted. The honorable managers seem to forget that it is only in consequence of the right of the jury to give a general verdict that they get incidentally the *power* of deciding the law in any case, but that this

cannot in any manner enable them, either as to power or right, to have any control over the court in any collateral questions.—The maddest enthusiast that ever yet advocated the rights of jurors, has never questioned the right of the court to determine upon the competency and admissibility of evidence. Such being the law, it was the duty of Judge Chase, when the question meant to be established was, that Mr. Adams wickedly and corruptly sacrificed the interest of the United States to Great Britain contrary to his duty, to prevent the vote of Mr. Adams on that occasion being given in evidence to the jury, either as proper directly to prove the fact, or from which they ought necessarily to infer it. And I again repeat, if he had suffered such evidence to have been given to them as proper and relevant, he would have been much more deserving of impeachment.

I have stated that there is two ways of proving the issue—either by directly proving the *fact* in issue, or by proving some fact from which the fact in issue ought legally to be inferred; and that in the one case and the other the court are the judges as to the competency and the admissibility of the testimony. But I go further, it is the court who have a right to determine whether or not the fact in issue *ought* to be inferred from a fact proved, or what fact, being proved, will justify a jury in inferring and accordingly finding the fact in issue. I will, Sir, explain my meaning —The question in issue is a grant or no grant of a tract of land; the grant is the fact to be established; no grant can be produced, but evidence is given of possession for a great length—a regular transferrence of the property as having been granted—payment of rents to the successors of the supposed grantor, &c. the court not only determine what testimony is proper to establish these facts, but they direct the jury that if they believe the evidence, they then ought to find that a grant had been given. On this point I refer to Cowper, page 112, and 12 Coke 2. So, Sir, if in an action of *indebitatus assumpsit* for money due, the defendant pleads the act of limitation, and the plaintiff replies a promise to pay within three years—If on the trial of the cause the plaintiff proves an *acknowledgment* of the debt within the limited time, the court will instruct the jury, that if they believe that fact, they ought to find from it, as being sufficient evidence for the purpose, the fact in issue, that he did *promise to pay*. Yet if the jury was to find a special verdict, stating that within three years the defendant had acknowledged the debt, the court could not give judgement, but must order a *venire facias de novo*; because the jury would not have found the fact in issue, but only a fact which was, as evidence, sufficient to have justified them to have found by their verdict that the defendant did assume. Again, in the case before supposed, evidence was given to the jury that the defendant had acknowledged the debt as aforesaid, the court would instruct the jury that upon that evidence they ought to find the defendant had promised, and if the jury did not give their verdict for the plaintiff, the court would grant a new trial. So, Sir, in an action of trover and conversion—If it was proved that the defendant had the thing in possession for the conversion of which the suit was brought, and evidence is given that the plaintiff demanded the article from the defendant, and that he refused to deliver it, though this is not itself a conversion, and if the jury was to find a special verdict stating these facts, the court could not give judgement, yet the court would direct the jury that upon such fact being proved, they oughht to find the fact in issue, to wit, the conversion, and if the jury was not to find for the plaintiff the court would grant a new trial.—Again, in the case of an action

brought to recover money and the statute of limitation pleaded—if the defendant acknowledges the justice of the debt, but at the same time absolutely and unequivocally declares that he never will pay any part of it, the court would instruct the jury that upon such evidence they could not find for the plaintiff, for that the acknowledgment of the debt being only presumptive evidence of a promise to pay it, that presumption was taken away when acknowledgment was accompanied with a direct unequivocal declaration that he never would pay any part of it. So in the case of trover and conversion, if the thing in question was large, heavy and unweildy as a large piece of mahogany or other timber, and when the delivery of it was demanded, the defendant was to refuse troubling himself on the occasion, but to direct him to where this ponderous article lay, and tell him that he might take it into his possession when he pleased; the court would certainly say there was no proof of conversion—the *prima facie* evidence being defeated by the circumstances of the case.

I have introduced these cases by way of illustration; and to shew that the court determines what is proper evidence to prove the fact in issue,—from what fact the fact in issue may be inferred—and also what evidence is admissible to prove this secondary fact; & therefore as the vote given by Mr. Adams of which Callender wished to give evidence was not sufficient to prove directly the charge that Mr. Adams had wickedly, and against his duty, sacrificed the interest of his country to that of Great Britain—nor was a fact from which tde jury on principles of law ought to have inferred it; and I am sure no person will attempt to support the contrary, therefore, that my honorable client instead of being impeachable for rejecting such evidence, would have exposed himself to censure had he admitted it.

Nor can I doubt but that the respectable counsel who were concerned for Callender, would have cheerfully acquiesced in and approved of my honorable client's conduct in this respect, had it not been for a cause, which they honestly acknowledged, their extreme ignorance of the law which relates to the doctrine of libels—and which had induced them to use every exertion to obtain a continuance of the cause to a future term, that in the mean time either in their own offices, or under the instruction of some legal character, they might acquire a more accurate knowledge of that branch of the law.—An indulgence that it seems they could not prevail upon the court to give,—for the refusal of which, however, I hope my honorable client will not be thought impeachable.

I have now, Sir, finished my observations on the third article, and am under the direction of this honorable court whether I shall proceed to the fourth, or wait till they take some refreshment. (It was now three o'clock, and the court adjourned for half an hour.)

[*The court having again met, Mr. Martin continued.*]

I shall now, sir, proceed to the fourth article which charges the respondent's conduct to have been marked during the whole course of the trial by manifest injustice, partiality and intemperance.

From the evidence it certainly appears that judge Chase prevented the counsel from arguing to the jury, that the sedition law was unconstitutional; and this seems to have given rise to a a great portion of the altercation and ill humor between the court and the bench.

I admit that the constitution gives to a criminal the right of having coun-

sel; But the constitution has not defined the rights or duties of counsel, or to what extent they are to exercise them.—One thing, however, is certain, —that they have no constitutional right to impose upon the court or to mislead the jury.

When Callender's counsel contended that if the jury have a right to decide questions of law, then the constitution being the supreme law of the land, the jury must of course have the power of deciding on the *constitutionality* of a law; the judge might well say it was a non-sequitur.

What has been allowed to the jurors as their incidental right on the general issue? Not to decide whether there is an existing law, or whether a law is in force, but to declare the true construction of an *existing* law, and whether the case at issue comes within the true construction of such law.

But those who contend that the jury have a right to determine the constitutionality of a law, insist not for the power of the jury to decide its true construction and whether the prisoner's case comes whithin it, but to decide whether what is produced as a law is not void, a mere nullity, a dead letter; or in other words whether such a law is in existence.—The maddest enthusiasts for the rights of jurors—their most zealous advocates have never contended for such a right before the cases of Fries and Callender. Whether a law exists, whether a law has been enacted—whether a law has been repealed—whether a law has become obsolete or is in force? The decision of these questions have always been allowed the exclusive right of the court.—The power of the court to decide exclusively upon these questions hath never been before controverted. Nay the very right claimed on behalf of jurors, that they may determine what is the true construction of the law, and whether the case is within its provisions, of itself necessarily presupposes, and is predicated upon the *existence of a law*, the *true construction* or *meaning of which* they are to determine.—It has indeed been seriously questioned, and that by gentlemen of great abilities, whether even the judiciary have a right to declare a law passed by the legislature, to be contrary to the constitution and therefore void! I shall not enter into an examination of that question; but I have no hesitation in saying that a jury have no such right—that it never was intended they should have such right, and that if they had the right, we might as well be without a constitution.

The first specific instance of my client's unjust, partial and intemperate conduct, which is stated in this fourth article is, that he compelled the Traverser's counsel to reduce to writing the question which they meant to propound to Col. Taylor. The correctness of this procedure will depend on the question, whether the court had by law such a power, for if such a power was possessed by them, it is to be presumed that they, on that occasion, exercised it according to their best discretion, nor can it be inferred that their conduct was criminal, because the procedure was *novel* in Virginia. There are cases in which the practice of a court may be considered the law of the court; but these are not in any manner analogous to the case in question; nor do I find that the *practice* of the state-courts is obligatory "in any case of this kind on the courts of the United States." My honorable client did not consider what was usual in Virginia, but what was correct and proper, he knew that the law authorised him to make this demand. In Maryland, where he imbibed his legal knowledge, and where at the bar and on the bench he had carried it into practice, nothing was more common than for

questions to be reduced to writing at the request of counsel, or at the request of the court. If counsel doubt of the propriety of the evidence meant to be drawn from the witness, or the correctness of the question meant to be propounded to him, they have a right to request it to be reduced to writing. So also, if the court, without whose approbation no testimony can be given to a jury, and whose duty it is to prevent improper testimony to be given, has reason to suspect an intention to introduce such evidence, they have a right, and they ought to require the questions to be reduced to writing, that there may be no misapprehension of the tendency of the question, and that they may more deliberately decide whether it is proper to be put to the witness. And in this case, the counsel were not required to reduce their questions to writing in the first instance, or before they had stated what they meant to prove, as hath been suggested. When Col. Taylor was called and sworn, the court desired to be informed what they meant to prove by him. M'Nally is an authority that in so doing they acted legally. The counsel stated the facts; to prove which Col. Taylor was called; upon which, the court doubting the admissibility of the testimony directed the question to be reduced to writing for their consideration. It cannot for a moment be seriously contended, but that the court had a right so to do. As my respectable colleague (Mr. Key) has observed, the practice of this honorable court during this trial, hath perfectly sanctioned that part of my client's conduct. If at any time a question has been put, the propriety of which hath been doubted, it has been directed to be reduced to writing;—It is true, that this has been principally, when an objection has been made by the counsel;—but there can be no doubt, that if any honorable member of this court had apprehended the question to be improper, the court would have had a right, and would have directed the question to be propounded in writing for their consideration. The propriety, the principle, in each case is the same. On this part of the charge I need not dwell any longer.

The *next instance* of the judges conduct specified in this article is his refusal to continue Callender's case to the next term, notwithstanding the affidavit filed, and the applications made.—On this subject, I shall not make many observations as to the law; but I may venture to assert that the conduct of judge Chase in this instance also appears to have been free from any corrupt or oppressive motive or design—no part of his conduct on this occasion has been produced to shew that he entertained a disposition, to prevent Callender from obtaining the testimony of his witnesses, or to deprive him of the necessary time to procure their attendance. Let it be recolleeted that the first affidavit prepared and proposed to be filed in order to obtain a continuance of the cause was a general affidavit. By the laws of England a general affidavit is not sufficient to entitle the party to a continuance—and upon principles of law as adopted in England and in the United States, at least in Maryland, a supplemental affidavit cannot in a case of this nature be received.

If then judge Chase had wished that Callender should have been, at all events, prevented from a continuance of his cause, he would have suffered them to have filed their general affidavit.

According to the laws of England, and so is the law considered in Maryland, to entitle the party to a continuance, he must file an affidavit shewing what witnesses he wants—what he expects to prove by them—that he has used due deligence to procure them, and that he has a reasonable expecta-

tion to procure their attendance at some time.—jude Chase, had he wished that Callender should be deprived of a continuance of his cause, would have suffered them to file their general affidavit, but what was his conduct? Desirous, they should not improperly and hastily commit themselves, and lose advantages to which they might be entitled, he gave them a caution, and time till next day to profit by it. On the next day they did, it is true, file a *special* affidavit; but this special affidavit so drawn up, under the caution given them by the court, is not such as can in any degree, stand the test of legal investigation even under the authority, which one of the honorable managers (Mr. Rodney) hath this day introduced.—Callender did not in his affidavit state that he expected to be able to procure his witness at the next term, the term after, or at any term: He also stated that there were certain books necessary for his defence, but he did not state that he had endeavored to procure them before—or that he expected to get them against the next term.—And surely, if when Callender wrote that libel, he founded any part of his charge upon books which had been published, he ought to have had them by him when he wrote and published, and to have kept them by him for his defence whenever he should be called upon to answer for that publication, and could have no right to claim a continuance for the purpose of obtaining such books. One of the honorable managers (Mr. Rodney) has this morning referred us to 6th vol. Bacon's Abridgement, from page 650 to 652 upon the subject in contest, the mode of putting off a trial, and there as he acknowledges, and as the authority enforces "if there is any cause of suspicion, that delay is the object, the court should be satisfied from circumstances, that the person absent is a material witness—that the person applying has been guilty of no laches or neglect—and that he is in reasonable expectation of being able to procure his attendance at some future time." That the court had in Callender's case just reason to believe that delay was the sole object of the counsel, no person can doubt—Nay, the counsel themselves have upon oath declared, that delay was their object—That they had no hope or expectation that witnesses could be of any service to them; that they considered Callender's cause desperate if the law was constitutional—and that their great object was to continue the cause to another court that it might not be tried before my honorable client, of whose conduct in the case of Fries they had heard, and against whom they had formed, it seems, the most decided prejudices.

This authority then produced by the honorable managers, perfectly justifies the conduct of my client, in refusing upon that affidavit, to continue the cause to the next term. The court was then sitting to hear the charges brought before them—it was their duty to have them determined without unnecessary delay, that if the party was innocent he should be acquitted, if guilty that he should be brought to speedy punishment. The same honorable manager has from the same authority shewn, "that upon the particular circumstances of the case the court will make a rule for putting off the trial of a cause to the second term after the rule for putting off the trial is made." I admit the law, and will therefore readily admit that if an affidavit had been made by Callender stating that he expected to be able to prove certain facts, stating what the facts were, by witnesses, who from their particular situation, could not with any probability be produced before the second term, after the affidavit, and could then probably be had, the court might with propriety, and perhaps ought to have continued the cause to the second court,

but no such affidavit was made ; therefore not having made out such a case, they have no reason to complain that they had not the benefit of it. They did not even swear that they expected to be able to procure the attendance of their witnesses at any time whatever.

A case has also been referred to in Cowpers reports, where the defendant wanting the testimony of a witness who lived out of the jurisdiction of the court, and the court not having the power to issue a commission to obtain his testimony, the court declared that if the plaintiffs would not consent to have the deposition of such witness taken to be read at the trial, they would continue the cause indefinitely. The honorable manager has further said that though in England the court cannot issue a commission to examine witnesses, yet here the court has a power to issue a commission for that purpose. This honorable court will recollect that the case of Callender was a criminal prosecution, I doubt whether the court has any power in a *criminal* case to issue a commission to examine witnesses for or against the prosecution ;—I do not know of any law which gives them that power.—If the honorable managers know of such a law, they will be so obliging as to refer us to it.—But I will take up the objection upon each view, suppose a commission might have been issued, the counsel of Callender did not apply to the court to grant a commission, and to continue the cause till the commission was returned. Suppose a commission could not be issued, Callender's counsel did not apply to the attorney general of the district for his consent, that these witnesses should be examined where they lived, and their deposition be read in evidence on the trial, they did not apply to the court for their determination, that the counsel for this prosecution should consent to this, and that if he refused, the cause should on that ground be continued. Had they prayed a continuance on either of these grounds, and it had been refused, they might have had some pretext under their authorities for complaint, but this ground they never attempted to take.

Had they prayed for a commission, and the law authorised it, it is to be presumed the court would have granted it, if the court could not grant a commission, and the defendants counsel had proposed that the depositions of absent witnesses should be taken to be read at the trial, it is possible the court would have continued the cause unless the prosecutor would have consented that depositions should be thus taken. Hence therefore on no principle doth it appear that there was any thing improper, incorrect or illegal in refusing a continuance of the case of Callender.

But sir, there is another ground upon which the conduct of the court was strictly justifiable in requesting to know by the deposition what the absent witnesses were expected to prove, and also in refusing to continue the cause.—Upon their own statement, the witnesses wanted were only material to a few of the charges in the indictment. —Their absence therefore could not be a sufficient reason to put off the trial. —The attorney might have struck out of the indictment those sets of words to which their testimony was wanted, and proceeded to the trial, upon the other part of the charge.—And as the punishment both as to fine, and imprisonment was discretionary, not exceeding a certain sum and time,—Callender was equally in the power of the court, convicted on a part, as if he had been convicted on the whole of the charges —and the court having the discretion, and having refused a continuance for the want of the testimony suggested, had it in their power, when they passed sentence to throw out of their consideration, those parts of the charge for which the testimony was wanted.——

And on this subject the case put by my respectable colleague (Mr. Key) is perfectly in point; he supposed the case of a person indicted for stealing a horse, saddle and bridle; to delay the trial, the prisoner suggests the want of witnesses—the court compel him to declare in his affidavit what he expects to prove by them. It appears that he only wants to prove that the bridle was his own! This surely would be no cause for delaying the trial. The prosecutor might instantly strike out of the indictment, the bridle, and there could not be the least pretext for not going to trial upon the residue of the charge, the stealing the horse and saddle. So in Callender's case, the want of witnesses to justify as to a few sets of words, could afford no reasonable cause why he should not be tried upon a dozen or more sets of libellous words, charged in the indictment, as to which he did not pretend to alledge that he wanted a witness.

In Maryland, it has ever been the practice to try criminal prosecutions of what nature soever at the first court, if practicable, and not to continue them unless some legal cause is shewn. Judge Chase had been accustomed to this mode of procedure. It was in Maryland that he acquired the first rudiments of law. It was in that state that his legal knowledge was matured by practice.

Why should capital cases, rather than inferior crimes, be tried the first court? The honorable managers admit that it is the general rule not to continue, but to try at the first term, capital cases. Surely if indulgence, if delay is necessary in any case it is in a capital case, where life is at risque; where an injury if done is irretrieveable!

There are many reasons, which shew the propriety that prosecutions of every kind should be decided with as little delay as possible. One of the principles as to criminal jurisprudence, as governor Clairborne has justly observed, is that though punishments should be mild, yet they ought to be *speedy*; by having an immediate decision there is a greater certainty that the criminal shall not elude justice by flight. The expence whether to the criminal or to the public is increased by delay; delay also hazards the loss of testimony by the death or absence of witnesses; and therefore diminishes the chance of having justice done, either to the party or to the public, the one or the other of whom may be essentially injured for want of testimony, which might have been had if the trial had not been delayed; but even if witnesses live, and can be had at the trial, yet the lapse of time impairs memory, and their testimony cannot be relied upon in the same manner as if they were examined immediately after the transaction, when every circumstance would be fresh in their memory. These, with many other reasons which might be given, have actuated our courts of justice in Maryland, never to continue criminal prosecutions of any kind, if it can be avoided; and shew the propriety of their conduct.

The next specification, in this article, of improper conduct in the judge, is, that he "used *unusual* RUDE and *contemptuous expressions* towards the prisoner's counsel; and insinuated that they wished to excite the public fears and indignation, and to produce that insubordination to the law, to which the conduct of the judge did at the same time manifestly tend." As to this part of the charge, there is but little of a legal nature contained in it, I shall therefore hastily pass over it. If true, it seems to be rather a violation of the principles of politeness, than of the principles of law; rather the want of decorum, than the commission of a *high crime and misdemeanor*. I will readily agree that my honorable client has more of the "fortiter in re," than the "suaviter in modo," and that his character may in some respects be considered to bear a stronger resemblance to that of lord Thurlow than to that of lord Chesterfield; yet lord Thurlow, has ever been esteemed a great legal character, and an enlightened judge.

But let me ask this honorable court whether there is not great reason to believe that the sentiments my honorable client expressed with respect to the conduct of the counsel and their object was just and correct? What was the conduct of Callender's counsel? Was it not such as immediately tended to inflame the minds of the by-standers, and to excite their indignation against the court,—and highly insulting to the judges? In the first place,

they endeavored to obtain a continuance of the cause to next court, merely with an intention to procure delay, and to prevent the cause being tried before judge Chase, acknowledging that they had no hopes or expectation from *any testimony* to save their client if the law was determined to be constitutional; and yet they brought forward their client to swear just what they pleased, in order to procure this delay, with respect to the necessity of witnesses, whose testimony they acknowledge they were conscious could be of no service to them,—and yet they wished the by-standers to consider the court acting highly *improper* for not granting that continuance! Was this even to serve Callender? No, they avow they did not appear to serve him, but to serve *the cause*.—Sir, it appears from their own evidence, that Callender would have submitted to the court, but for their interference; that they volunteered on the occasion not for *him*, but for *their cause*; and yet the volunteers wanted the court to give them to another term to prepare themselves, and made Callender swear what they pleased to effect their purpose. They said they were not well acquainted with the law upon libels, and therefore wanted time to examine the subject; but surely when persons undertake to volunteer their services on any subject, they ought to be masters of it, and are entitled to no indulgence of delay. And as they declare they had formed the determination, on the first instance of an indictment under the sedition law, to come forward to volunteer their services for the sake not of the man, but of their cause. Common decency to the court, and a proper respect for themselves, ought to have dictated to them in the interim to have made themselves fully acquainted with all the law relative to that subject in which they had thus determined officiously to interpose.

In the next place, when the jury were about to be sworn, they challenged the array in order to set aside the whole panel. Such challenge can never be made correctly, but for the jury being returned by an officer not authorised, or for unfair and partial dealings in the officer who summons the jury. The reason assigned was, that one of the jurors who was returned had expressed sentiments inimical to Calender. This, if true, might be a good cause to challenge the individual juror for favor, but no boy, who had read in an office six months, would have supposed this a sufficient cause to have challenged the array, unless it had been further alledged that the marshal knew the juror had expressed such sentiments before he had summoned him, and had summoned him for that reason, which was not suggested. Is it possible to believe that legal characters of so great estimation, that one of them was then the attorney general of the state of Virginia, another almost immediately after appointed attorney general of the United States for the district of Virginia, and the third, appointed one of the chancellors of that state, should have been so utterly ignorant of the law relative to the challenge of the array, as to have made the motion they did? If not, it must be presumed their conduct was influenced by a wish to embarrass the court; to hold up the proseeutio as oppressive; to excite public indignation against the court and the government, who endeavored to enforce it, by attempting to impress a belief on the public mind, that even their marshal had in the very beginning, violated his duty to gratify the wishes of an oppressive government, and that for that purpose he had unfairly packed a jury! Was not this immediately, was it not designedly done, for the purpose of exciting public indignation? What was the conduct of the same counsel when the court desired them to reduce to writing the questions they meant to propound to col. Taylor? They have declared they hesitated whether they would do it; and before they did comply with the courts direction, they made a direct effort to hold up to the bye-standers that the court was acting with oppression and partiality to the prejudice of Callender, by imposing on his counsel difficulties and impositions which the court had not imposed upon the counsel for the prosecution! Whereas in fact the counsel for the prosecution, had fairly stated the testimony he meant to offer, before he produced his witnesses, having no desire that the jury should be surprised with improper evidence,—whereas the counsel for Callender, wished to have witnesses examined to the jury, without the least previous disclosure to the jury or court, of the evidence meant

by them to be given; most evidently that they might have testimony illegal thus imposed upon them; and because they were, by the correct interposition of the court defeated in this object, they could not consent even to let this act of the court pass, without a direct attempt to impress upon the bye standers, that it was another instance of the unfair and oppressive conduct of the court, which ought to excite their indignation! And here let this honorable court remember that Callender, in his Prospect before us, had in the most solemn manner appealed to the state of Virginia, that if ever the time should come, when the government of the United States should attempt to prosecute him and make him a victim under the sedition law, that state was bound under every principle of interest, of justice, and of the claims he had upon them, to come forward, and at *all risques* and *by all means* to protect him. Is there not, sir, great reason to believe, that the object of counsel was to second this appeal so made by Callender, and to induce the people of Virginia, to come forward to save their client from the pretended oppression of government,---to rescue him from their fangs!

One of the gentlemen who was the counsel of Callender, has told us, that whenever a prosecution should be attempted under the sedition law, he had formed the determination to come forward to prove its unconstitutionality. That in consequence of this determination in Callender's case, and *only* for that purpose, he did appear in order to argue its unconstitutionality. He has told us further, that he had no hopes of convincing the court, and scarcely the faintest expectation of inducing the jury to believe, that the sedition law was unconstitutional; but yet that he wished to argue the question, with a view of making a proper impression upon the public mind? and yet he has disclosed to us upon his oath, that when the court had charged him with wishing to address himself to the populace and not to the court, he denied the charge, and told the court he only wanted to address himself to and to be heard by the court, and did not wish to be heard by the jury and by the bye standers! When at the same time he knew he could not be heard by the court, without also being heard by the jury and the by-standers, unless they had all been, a thing unknown, sent out of the court house; or what is equally unknown, had their ears stuffed with cotton, or filled with wax; and yet the same gentleman has said on oath, notwithstanding that declaration, that it was his chief, almost his sole object upon that subject, to be heard by the by-standers, and on them to make proper impressions! What barefaced, what unequalled hypocrisy doth he admit he practised on that occasion! What egregious trifling with the court! But, I would ask this honorable court, what were the impressions which Mr. Hay was so solicitous to make on the people? Was it merely to convince them that the sedition law was unconstitutional, and ought not to be enforced? Had not the legislature of his state some time before announced this law as unconstitutional, and destructive to liberty? Had they not circulated the denunciation throughout every part of their own state, and sent it to every legislature in the union. Do not let me here be understood to censure that honorable body, or to question the propriety of their conduct, or the rectitude of their motives; far be it from me to doubt that they honestly believed the law to be unconstitutional, and fraught with all the evils which they suggested would flow from its execution; and therefore that they thought it a sacred duty to act as they did. I am not in the habit of questioning the motives which influence public or private bodies; it is my duty to leave that question to their own consciences and to their God; I myself view them in the most favorable light: I only mean to state as a fact, a transaction of notoriety; but can it possibly be supposed after this, the people of Virginia wanted a speech from Mr. Hay, to induce them to consider the sedition law unconstitutional, or could he expect that those who doubted after being so well acquainted with the sentiments and conduct of their legislature, would be made converts by any thing they should hear from him! No sir, no person can think it. What then was his motive? Was it not to impress on the people, that, not only an unconstitutional, oppressive law, was about to be enforced; but also that the court, in order to enforce it, was acting in the most unfair and oppressive manner, as well as

the marshal; and thereby to inflame the resentment and indignation of the populace against the court? I will not say that he really wished so far to have excited their violence, against my honorable client as to have endangered his life; but it is impossible that I should doubt but that it would have given him pleasure, that their violence should have been so far at least excited, as to have intimidated the court from executing this obnoxious law.

When my honorable client went from Baltimore to Richmond, to hold the circuit court, he knew how violently that state was opposed to the enforcement of this law; but he equally knew that it was *his duty* to carry it into execution, without regard to the sentiments of any portion of the community, or however disagreeable it might be to them. Under these circumstances he went to Richmond, and finding the counsel from the first step in this cause, attempting, as he could not but consider it, to inflame the audience and excite their indignation against him. My honorable client, who well knows mankind, and has been accustomed to popular assemblies, appears to have been anxious, as his best security, to keep the by-standers in good humor, and to amuse them at the expence of the very persons, who were endeavoring to excite the irracibility of the audience against him. Hence the mirth, the humor, the facetiousness, by which his conduct was marked during the trial; and which, most fortunately, was attended with the happy consequence he hoped from it, for it is admitted that he kept the by-standers in great good humor, and excited peals of laughter at the expence of the counsel, as the witness very justly concludes, for he says, "The Counsel did not appear to *join in the laugh*." And this, sir, most satisfactorily accounts for the more than usual exertion of his facetious talents on the trial of Callender; and I doubt not was the real cause of that exertion.

Among the different charges made against judge Chase of rudeness, and unusual language, by him used towards the counsel of Callender, we find it stated, that when the judge had repeatedly declared, the counsel could not be permitted to argue to the jury the constitutionality of the law, and one of the counsel, who appears to have felt particularly sore on the occasion, still urging that question to the jury, the judge interrupted him and declared that the counsel of Callender had from the first mistaken the law, and that they had persisted in pressing their mistakes on the court. Never was there a more proper or correct expression used by a judge. Never, I believe, did the conduct of lawyers more fully justify such a charge! And, if the abilities of the counsel are as great as they are represented to be, it is almost impossible not to believe, their errors were intentional, and with the express view to embarrass the court. In the first place, they insisted that the jury, not the court, was on the indictment of Callender to assess *the fine*, which should be imposed upon him; if found guilty. This was one of their errors, and a most egregious error it was. And yet my honorable client has been charged with *rudeness* for calling it as one witness states, "a wild notion."—Or as Mr. Robinson has it in his *short hand*, "a mistaken notion." Either of these expressions was in my opinion extremely mild. I sir, should not have hesitated in calling it a *mad* notion.

The idea that the array was to be quashed because there was returned an individual juror, who was supposed to be liable to be challenged, was another mistake; a mistake that even a school boy in law could scarcely be expected to have made. The affidavit so incorrectly drawn, and their insisting on a continuance of their cause in consequence of that incorrect affidavit, was another mistake.

An additional mistake, was their idea that the court had no right to know what testimony they meant should be given by the witness produced, and that it was improper to require that the questions meant to be propounded to col. Taylor, should be reduced to writing.—And the attempt to obtain from the jury a decision that the sedition law was unconstitutional, in which they so pertinaciously persisted, was also an error. I ask then whether, when the counsel had been guilty of all these mistakes, it did not perfectly justify my honorable client in the expressions he used, that they had been from the first mistaken, and that they had continued throughout pressing their mistakes upon

the court? Nay, did it not justify the observation used by him, which has been urged as most exceptionable, "that they must know better; and that their conduct was intended to influence the by-standers."—That the counsel's great object was to give an impression to the people has been acknowledged on oath; and the court must have had a very moderate idea indeed of the legal abilities of Callender's counsel if they could have supposed such a succession of errors to have arisen from ignorance.

But the judge is also charged with great rudeness in the manner in which he replied in one part of the argument to Mr. Wirt, just at a time when that gentleman had finished a syllogism; by replying that it was a *non sequitur*.—I will state the transaction. Mr. Wirt having, as he supposed, established the position, that the jury had a right to decide the law as well as the fact, he proceeded to state that the constitution was the supreme law of the land, and therefore that since the jury had a right to decide the law, and the constitution was also the law, the jury must certainly have a right to decide the constitutionality of a law made under it; and this conclusion was as he declared, perfectly sylogistic. As Mr. Wirt had assumed the character of a *logician* in his argument, nothing could be more natural than for the judge in his answer, to assume the *same character*: He therefore replied, like a logician, "a non sequitur, sir;" The correct answer to a syllogism, which is rather lame in its conclusion. But it seems this answer was accompanied by a *certain bow*. As *bows*, sir, according to the manner they are *made*, may like *words*, according to the manner they are *uttered*, convey very different meanings; and as it is as difficult to determine the merit or demerit of *a bow* without having seen it, as it is the expression of words without having *heard* them. To discover, therefore, whether there was any thing *rude* or *improper* in this *bow*, I could have wished that the witness, who complained so much of its effect, had given us a *fac simile* of it. Had we been favored not only with the answer, but also with a complete *fac simile* of the *bow*, we might have been better enabled to have judged of the propriety of my honorable clients conduct in this instance. But it seems this *bow*, together with the "*non sequitur*," entirely discomfited poor Mr. Wirt, and down he sat "and never word spake more!" If so, it was a saving of time. But we have no proof that Mr. Wirt meant to have proceeded any further in the argument, even had he not been encountered with this formidable bow and non sequitur. And the presumption is, that having condensed the whole force of his argument into a syllogistic form, and finding his syllogism did not produce the conviction intended, he took his seat without wishing to spend more of his breath in what, after the failure of his logical talents, he no doubt considered a fruitless attempt. Mr. Nicholas followed Mr. Wirt, he is a gentleman mild and polite in his manners, he was treated by the court with politeness. He did not *persist* in addressing the jury contrary to the decisions of the court, he therefore met with no interruptions.

We have now more particularly to discuss the charges made against judge Chase, as they relate to Mr. Hay, the other counsel for Callender. Mr. Hay insisted that the indictment could not be supported, because the title of Callender's publication, parts of which were charged to be libellous, was not inserted in the indictment, to wit, because it was not stated in the indictment that the book, which contained the libellous matter, was called "The prospect before us." And to support this objection he went on to prove, that when an indictment states libellous writings in tenor following, the libellous part of the writing set forth, and on which the indictment is found, must be set forth "verbatim et literatim!" There was no attempt to shew that any expression in the indictment, was not stated correctly both *verbally* and *literally*, as published by Callender. The indictment did not charge the title of the book as being libellous. It did not notice the title of the book in any manner. If the title of the book was necessary to have been inserted, which I deny, there could not have been a more absurd or inconclusive argument to support the position, than that upon which Mr. Hay relied; and the judge shewed great temper in merely exposing it to ridicule in the manner he did, by observing, that as he insisted the libellous mat

ter should be set out *verbatim* et *literatim*, he wondered he had not also insisted it should be set forth *punctuatim*. An observation, by the by, which perhaps contained full as much of good sense as of smartness, since we all know the same words written or printed, will be liable to different constructions, and convey very different meanings, as they are punctuated. Mr. Hay, it appears from his own testimony, as well as the testimony of the other witnesses, was guilty of very improper conduct to the court. He insisted that if the prisoner was convicted upon that indictment, he might again be indicted for the same offence, and could not defend himself by the conviction on the indictment then before the court. When the court assured him he was mistaken in the law, Mr. Hay still persisted and declared, that he should not be more surprised, even if Mr. Callender should again be indicted for the same offence, and should be punished a *second time* for the same offence, than he was surprised at the indictment then before the court, and the attempt to punish Callender in consequence of that indictment. What language, I pray you, could be used to the court, but in reality addressed to the populace, more derogatory to the then administration, as being unprincipalledly oppressive, or containing a more direct attack upon the integrity of the judges, holding them up as the venal tools of the then administration, ready to be the instruments of its oppression!

What was also the final conduct of Mr. Hay, when having repeatedly attempted to argue to the jury against the direction of the court, and having as repeatedly been interrupted and stopped by the court? He took up his papers to withdraw; upon which the court told him, if he pleased he might proceed. His answer was, "I *will not*." When the court further observed, you will not Mr. Hay, be captious, go on if you please in any manner you choose, and we will not interrupt you. Even then, when in my opinion, the court had, as in Fries' case, made improper concessions, what was his answer? "I am not captious, *but I will not proceed*." And he folded up his papers and withdrew.

How came he thus to act? As to Callender, he acknowledges he despised the wretch, that his object was to serve *the cause*, not Callender. How was he to serve the cause? By giving an impression to the public mind. What impression did he wish to give? By holding up the idea of oppression on the part of the government, and corruption on the part the court. But finding himself thus foild in his attempt, by the superior abilities of my honorable client and his superior knowledge of mankind; finding that, instead of exciting indignation against my client, my client most fortunately had excited against him the laughter and ridicule of the auditors. He went out in a passion. At the same time, even the manner in which he left the court, shewed his wish to impress the public mind, as far as possible, with sentiments disadvantageous to the court. And as to the interruptions Mr. Hay received, they are clearly proved to be in consequence of his pertinaciously attempting to act contrary to the direction of the court, and in that case the only question could be, whether the court or Mr. Hay had the control over the other.

But sir, there is another charge which has been made against my honorable client, to justify that part of the article which accuses him of *rudeness*. It is said that speaking of Callender's counsel, or addressing himself to them, he called them "*young gentlemen*." To me it appears astonishing, that these expressions if used by the judge, should be thought reproachful to the counsel, or a proper subject of a criminal charge; and it gave me real pleasure to find that Mr. Nicholas, whose whole conduct marks him as a gentleman, did not consider them offensive. He has observed that he was young at the time, and whoever has seen him as a witness, must be convinced of the truth of his assertion. But we are told that Mr. Wirt was at that time, about thirty years of age, had been a married man, and was then a widower. It doth not appear that judge Chase knew of these circumstances; but if he had, considering that Mr. Wirt was a widower, he certainly erred on the right side, if it was an error, in calling *him* a *young* gentleman. But, sir, let it be considered that my honorable client has been stated by the honorable managers, to be nearly three score and ten, let also his great legal attainments be considered, and let

me ask, if any person can think his addressing gentlemen, so much inferior to himself in age and knowledge, by the epithet of "young gentlemen," *offensive* to them, much less *criminal* as to the public? But as another instance of his rudeness, we are told, that addressing himself to Mr. Wirt, who observed that "he was going on," the judge replied "no sir, I am going on, therefore sit down sir." This address was made by the judge to Mr. Wirt, when he (the judge) was about to give a long opinion to him and the counsel employed with him, which opinion, upon Mr. Wirt's sitting down, the court did give. And pray, sir, was there the least impopriety in a situation of that nature, that the court should desire the counsel to be silent and to take their seats?

Before judge Chase went from Baltimore, to hold the circuit court at Richmond, he knew that the sedition law had been violated in Virginia. I had myself put into his hands The prospect before us. He felt it his duty to enforce the laws of his country. What, sir, is a judge in one part of the United States, to permit the breach of our laws to go unpunished, because they are there unpopular, and in another part to carry them into execution, because there they may be thought wise and salutary? And would you really wish your judges, instead of acting from principle, to court only the applause of their auditors? Would you wish them to be what sir Michael Foster has so correctly stated, the most contemptible of all characters, popular judges: Judges who look forward in all their decisions, not for the applause of the wise and good; of their own consciences; of their God; but of the rabble, or any prevailing party? I flatter myself that this honorable senate will never, by their decision, sanction such principles! Our government is not, as we say, tyrannical, nor acting on whim or caprice. We boast of it as being a government of *laws*. But how can it be such, unless the laws, while they exist, are *sacredly* and *impartially*, without regard to popularity, carried into execution? What sir, shall judges discriminate? Shall they be permitted to say, "this law I will execute, and that I will not; because in the one case I may be benefited, in the other I might make myself enemies?" And would you reallly wish to live under a government where your laws were thus administered? Would you really wish for such unprincipled, such time serving judges? No, sir, you would not. You will with me say, "Give me the judge who will firmly, boldly, nay, even *sternly*, perform his duty, equally uninfluenced, equally unintimidated by the "*Instantis* vultus tyranni," or the "*ardor civium prava jubentium*!"—Such are the judges we *ought* to have; such I hope *we have and shall have*. Our *property*, our [illegible] our *lives*, can only be protected and secured by *such judges*. With this honorable court it remains, whether we *shall have such judges!*

The remaining part of this charge states, that my honorable client "betrayed an indecent solicitude for the conviction of the accused, *unbecoming* even a *public* prosecutor and as highly disgraceful to the character of a judge, as it was subversive of justice!" I am not certain sir, whether I exactly know what is here meant by a *public* prosecutor. If thereby is meant the *public officer*, who prosecutes those charged with being guilty of crimes against the public, I am indeed sorry to find that those officers, so necessary, are holden by the house of representatives of the United States in so incorrect a point of view. I deny sir, the propriety of the remark; and must be permitted to rescue the *public prosecutor* from a remark so deregatory. *He* is as much the protector of innocence, as the avenger of guilt; his duties are as clearly marked as those of a judge. They have both one common object in view, though acting in different characters. The prosecutor and the judge are *equally* bound to shield the innocent, and to punish the guilty. The prosecutor does the same benefit to his country by saving the innocent from punishment, as by preventing the guilty from

impunity. Neither the judge nor the profecutor ought to *attempt* injuring *innocence*. It is equally the duty of both to punifh *guilt!* Such, fir, are my ideas. Such, fir, I have ever underftood the duties of an *office*, which I have held in the ftate of Maryland, for twenty-feven years or more; and if my conduct had not been during that period, confonant to thefe fentiments, I fhould indeed feel myfelf degraded and difhonored.

I have now Mr. President gone through the observations, which have appeared to me necessary upon the four first articles. If I have been thought tedious my apology is the respect I feel for the dignified source from which these charges have proceeded;—from my inability to decide, which of the charges the honorable managers will most rely upon, in their conclusion; and the consequent necessity of dilating upon them all; sensible of the extreme danger, that for want of exertions which indeed require greater abilities than I am able to bring into action, erroneous impressions should remain in any instance upon the minds of this honorable court, in a case of such public magnitude, and in which my honorable client is so deeply interested. For his sake,—for the sake of my country, I have felt it a sacred duty to exert those few talents which providence hath been pleased to bestow upon me!

[It was now five o'clock, when Mr. Martin, informing the senate, he had not breakfasted that morning,—and had not during that day taken any refreshment of any kind, except two glasses of wine and water;—That the fifth end sixth articles yet remained to be investigated by *him*, as being altogether of a *legal nature*. And that he felt himself too much exausted to proceed; sollicited the indelgence of the court to permit him to conclude on Monday, this was readily granted, and the court accordingly adjourned.]

The court having met on Monday, February 25th at half past 10, Mr. Martin proceeded, as follows:

After having returned my very sincere thanks to this honorable court for their polite attention on Saturday, in giving me time to this morning, I will now proceed to the further investigation of the case, in which we are engaged. But before I call your attention to the fifth and sixth articles of impeachment, permit me to notice some few points that I find had been unattended to by me on Saturday.

When a witness (Mr. Rind) who had been in some degree concerned in printing The prospect before us, appeared at the trial of Callender to give evidence against him, we are told judge Chase assured him that he might be under no apprehension from giving testimony, for that he should not be prosecuted on account of any thing he fhould disclose on that trial.

What is the fact from the evidence? Mr. Rind, it seems, was summoned as a witness,—he came forward without any objection on his part, to give evidence.—It was then that Mr. Hay, in order to throw impediments in the way of the prosecution, undertook to interfere with the witness of the United States, and to tell him that he was not obliged to give testimony, as it might criminate himself.—The judge replied it was very true, but that the court would take care the witness should not be prosecuted on account of any thing he should disclose in his evidence, which might affect himself.—— By this the court only meant that they would not institute any criminal prosecution against the witness, and if any indictment should be found against him grounded on the testimoney thus given by him, they would interfere with government to procure a *noli prosequi*, or pardon—and on these conditions, and under such promises, it is a most usual practice to introduce associates and accomplices to give evidence for the conviction of other and greater criminals.—But this is suggested to

have been improper in the judge;—and one of the witnesses, the present attorney general of Virginia, has on his examination rather hazarded the idea, that any interference of the nature in question ought to have been by the United States attorney for that district, and not by the court.

The gentleman is mistaken.—In Great Britain, when an accomplice is produced to be a witness, his production, and the security he hath against prosecution on account of any thing which he may disclose having a tendency to criminate himself, is the act of the court, and not of the public prosecutor, except so far as it is done under the direction and with the courts approbation; To support this position I will again turn to M'Nally p. 203.

"The admitting an accomplice as a witness for the crown, is not a matter granted by the *court* as of course, but depends upon the question, whether the indictment can be found, and supported without his evidence.

As in the *king* against Robert and William Luckhurst, Maidstone, Lent assizes, 1798.

Counsel for the crown moved, that Avery, an accomplice, might be brought before the grand jury to give evidence on a bill of indictment.

Justice Buller, said it was not a motion of course, and he desired the counsel to read over his brief, and certify that there was not sufficient evidence to convict without the testimony of the accomplice, otherwise *he would not* allow the motion; because it might be the means of letting off the worst offender, and punishing those to whom otherwise, according to circumstances, mercy might be shewn, and he instanced a similar case, which happened at York assizes.—The counsel then stated that this offender had been before admitted king's evidence against the others by the *committing justice*. Buller said that *he* would not pay any regard to that, because it ought not to be in the power of a justice of the peace to say, who ought and who ought not to be admitted king's evidence. The counsel thereupon said that on reading the indictment and his brief, he thought the accomplice ought to be admitted as evidence;—And *his motion was granted*."—That is by *the court*.—This authority clearly shews that in England it is considered the province of the *court* to decide when, and on what terms, accomplices shall be introduced as witnesses; and such has been the uniform practice in Maryland.

And here let me observe before I quit this subject, as to Mr. Hay's conduct, that although this witness came forward voluntarily to give testimony without making any objection on his part, Mr. Hay to obstruct the prosecution, *officiously* interfered as far as he could, to deprive the United States of the testimony necessary to convict the offender, and to dissuade the witness from being sworn. A conduct I confess, I cannot but view as being at least highly censurable, yet, sir, my honorable client suffered it to pass without even the smallest reprimand! This did not shew a disposition, on the part of judge Chase, to be captious even with Mr. Hay.

There was another part of the testimony I omitted to notice; I will now do it, lest the gentleman, who comes after me might make the same omission—It has been suggested by two of the witnesses, that the court in one instance, used the word "we," in the plural number as *identifying* the court with the prosecutor of the United States. Mr. Hay has stated it to have been on the following occasion; when the counsel for Callender reproached the court, with being guilty of partiality in requiring the questions by them propounded to Col Taylor to be reduced to writing although the court had not made a similar requisition of the prosecutor. The court in reply observed "the attorney when he opened his case, stated what he expected to prove;—*But though he did, we were not obliged*

to." He was asked if he was satisfied as to the correctness of these expressions, he replied in the affirmative, and being taken down as I have now introduced them, and read to him, he adhered to them. Some mistake there must be, for the words so stated are destitute of sense or meaning. "But though he did we were not obliged to." To do what? I presume, to have compelled him to give us his questions in writing.

The sense then must have been, that as the attorney had disclosed what he meant to prove, and as there was no doubt of the propriety of the evidence, therefore, they, the court, were not obliged to require of him to put his questions in writing. This construction reduces the answer to common sense and propriety, and frees the answer from obscurity and from censure.—Mr. Nicholas thinks the word "we" was used in one instance by the court, as understood by him, in the same incorrect manner, as identifying the court with the attorney, but not at the time, or on the occasion to which Mr. Hay alludes; he however is incapable to specify at what time, or on what occasion. I ask, sir, upon such evidence so uncertain, so vague, so unsupported, can any criminality be fixed as to this part of the charge upon my honorable client.

Indulge me, sir, with a few remarks on certain private and social conversations which it seems have taken place between the judge and some others,—and which though perfectly innocent of themselves, have been pressed into the service of this prosecution, and attempted to be distorted into criminality.—and I will then quit this part of the charges.—A very worthy and respectable gentleman, with whom I have long been acquainted, (John T. Mason, Esq.) has been called upon to disclose a jocose conversation, which took place between him and my honorable client, a few days before he went on to Richmond, to hold the court, at which Callender was tried. On that occasion he tells us judge Chase informed him that he was going to hold the court at Richmond, and that he was determined to teach the Virginia bar the difference between the liberty and the licentiousness of the press. That as to himself, there was no person a greater friend to its real liberty,—nor a more decided enemy to its licentiousness. Judge Chase further observed that he was in possession of a copy of The prospect before us, which *I had given to him*, and said *either*, that if the state of Virginia was not totally debased, or, that if there was an honest jury to be found in that state, but Mr. Mason thinks the first, he would bring Callender to punishment. Mr. Mason has declared the conversation was open and public in the presence of a number of gentlemen, perfectly jocular, and in great good humor, and it is proved the conversation was introduced by Mr. Mason himself, whose facetious talents are so well known.—That gentleman has declared that it was painful to him to be obliged now to disclose what then passed. Nor can any person doubt it;—or that nothing but a sense of the obligation he owes to his country when thus called upon to obey the claims society has upon him, could have induced him thus to disclose the particulars of this sportive facetious conversation introduced by himself, to gratify the views of any person, who would wish to turn it to the disadvantage of my honorable client.

But, sir, I will ask, in all this what is there which fixes any criminality on judge Chase, or which indicated on his part a disposition to oppress? It was a fact notoriously known, that the bar of Virginia, in general did, or at least professed to, consider the sedition law unconstitutional, as *unduly* restraining the liberty of the press,—that great Palladium of our rights. On the contrary, my honorable client with many other respectable characters, legal and other, considered it as a wholesome and necessary restraint upon its licentiousness,—and believed that such re-

straint was the best security for the preservation of its liberty. And on this subject let me introduce the authority of Dr. Franklin, himself a printer, and as great an advocate for the liberty of the press, as any reasonable man ought to be. He has declared that unless the slander and calumny of the press is restrained by some other law, it will be restrained by club law. The sentiment sir, is just. If gentlemen cannot find in the laws of their country a protection from that profligate conduct of printers, which is at this time so common, or cannot obtain from the laws of their governments ample punishment against their base calumniators, they will become their own avengers. And to the bludgeon,—the sword, or the pistol they will resort for that purpose.—But to return to my client, it was his knowledge of the prevailing ideas of the Virginia bar that induced him to use expressions which amounted to no more than his strong sense, that they had erroneous opinions as to what was the true liberty of the press, and did not properly distinguish between its liberty and its licentiousness.

And as to the determination, he expressed that he would bring Callender to punishment. Mr. Mason has declared that every thing the judge said on that subject was predicated upon the supposition, that Callender was in reality the author of The prospect before us.

There was nothing then personal as to Callender, but only an honest indignation expressed against a vile libeller whomever he might be.

The judge had in his hands one of the most flagitious libels ever published in America,—a case in which there had been the most impudent and daring violation of a law of the United States; —he considered it his duty to put the law in force against such an offender. And was it not? Yes sir, if a judge, *either of his own knowledge, or by information derived from a respectable source*, has reason to believe the laws of his country have been violated particularly in cases of magnitude, it is his *sacred duty* to recommend to the grand jury an examination into such crimes, and to endeavor to bring their perpetrators to due punishment. I, sir, disclaim the idea that a judge shews a want of impartiality because he is desirous to see *guilt* punished. I, sir, have no idea, that our judges should be, like the gods of Epicurus, lolling upon their beds of down, equally careless whether the laws of their country are obeyed or violated, instead of *actively* discharging their *duties*.—Judge Chase went to Richmond determined to enforce the laws of his country:—It was an honest determination! He might, it is certain, under the frivolous pretexts used for that purpose, have continued the cause to another term, he might by so doing have left the odium of enforcing this obnoxious law to be incurred by some other of the judges;—by so doing my honorable client might have avoided the obloquy to which he has been exposed on account of this trial, and this impeachment as far as it is founded thereon. But had he so done, in my opinion, he would have been *guilty of a cowardly dereliction of his duty*.

Mr. Tripolet has also been introduced to prove casual conversation in the moments of unsuspecting sociality and levity. He it seems travelled in the public stage with judge Chase to Richmond——On the second day of their journey, having formed an acquaintance during that time, some conversation being introduced relative to Callender, Mr. Tripolet informed the judge that Callender had, when he first came to Virginia been taken up in Berkley county as a vagrant——and judge Chase replied "it is a pity that they had not hung the rascal." And this is introduced to prove that the judge left Baltimore with a predetermination to oppress, and do injustice to Callender!

I have, sir, heard, I believe more than one hundred of the most respec-

table gentlemen of all political parties use similar expressions, not only when speaking of Callender, but also of some other printers: But these expressions I only considered as marking their disapprobation of the conduct of those printers, not as a proof they would be guilty of injustice towards them, or that they would do them any unauthorized injury.—Tripolet had in the stage, informed my client that he had never seen Callender, the judge meeting him at the door of the tavern, where they both lodged, as he came from court, the day on which the bench-warrant issued, observed to Tripolet, "that the marshal had gone after Callender, therefore that he probably would have the pleasure of seeing him," and a day or two after informed Tripolet that the marshal had returned without Callender, and he was afraid they should not catch the damned rascal that court—Tripolet has told us he boarded with judge Chase at the same tavern six days; they were travelling together three days, during this whole time of nine days, such only are the scraps of loose idle conversation, which have been picked up and brought forward as indicating a hostile and oppressive principle towards Callender.

As to the word "damned," which has been introduced in the conversation, however it may sound elsewhere in the United States, I cannot apprehend it will be considered *very* offensive, *even* from the mouth of a judge, on this side of the Susquehanna;—to the southward of that river it is in familar use, generally introduced as a word of comparison,——supplying frequently the place of the word "very" not confined to cases where we mean to convey censure, but frequently connected with subjects the most pleasing;—thus we say indiscriminately a very good or a damn'd good bottle of wine;—a damn'd good dinner, or a damn'd clever fellow.

But, sir, what must at once efface every pretence of a disposition hostile and oppressive towards Callender on the part of judge Chase, *is the mildness of the punishment inflicted.*

I now Mr. President shall proceed to the fifth and sixth articles of impeachment.—These relate to the process issued against Callender, and to the time at which it was made returnable.—By the fifth article—my client is charged with having "awarded acapias against Callender by which he was arrested and committed to close custody, although it is provided by an act of congress passed the twenty fourth day of September, in the year 1789, that for any crime or offence against the United States the offender may be arrested, imprisoned or bailed agreeably to the usual mode of process in the state where such offender may be found,—, and although it is provided by the laws of Virginia that upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending, to appear and answer at the next court."

The criminality alledged against my honorable client by this article as well as the *sixth*, consists in his violation of a law of the state of Virginia, by which it is supposed his conduct ought to have been regulated.

We find from the evidence in this cause, that the legal characters of that state, whether on the bench or at the bar, cannot agree among themselves as to what is the law of that state,—and that the practice has been and continues to be variant in various counties in Virginia.—Nay it is proved that two highly respectable legal characters, who successively held the office of attorney general (Col. Innes and Gen. Brooke) were applied to by one of their deputies, and declared themselves incapable to decide what ought to be the practice, or in other words, to decide in which cases a summons ought to be issued and in what cases a capias was the proper process.—Surely then judge Chase, who was a stranger in Virginia, cannot be considered cri-

minal nor even subject to reproach for not understanding a law of that state, the true construction of which remains even now a question, upon which the Virginia judges and lawyers find it impossible to agree.

Upon these observations I think I might safely rest my client's defence, as to this charge;—And even consent that he shall be convicted and removed from office, whenever they shall agree among themselves upon the construction of their law,—provided it should be against us.

But, sir, I must request to be indulged in an endeavor to investigate this subject which appears so intricate, and to try if I cannot throw such lights upon it as possibly may be serviceable to the gentlemen of the bar of that state, whose law is in question; and in this attempt I feel a confidence, that I shall be at least able to satisfy this honorable court, judge Chase, even if bound to conduct himself according to the laws of Virginia, which I utterly deny, and shall endeavor to disprove, acted not only free from criminality, but with the strictest propriety.

I shall lay down as a position, which will not be controverted, that in all *personal* actions, civil or criminal, instituted against individuals in Virginia as well as in Maryland the process to bring them in to answer to the suits is, and hath always been a capias, or process to arrest the body,—except so far as by legislative acts of the respective states, the law hath in certain cases been altered and *other* process directed.—And I mean to shew that every case in Virginia, civil or criminal, and some there are of both, where a summons is the legal process, arise out of the legislative provisions, that is the acts of assembly of that state. And by examining the different acts, which have been passed upon this subject, we shall be able to ascertain, what are the cases, and the only cases, wherein a summons ought to be issued.

I have sir, before me the laws of Virginia antecedent to the American Revolution; It is the edition printed at Williamsburg by *Rind*, *Purdie* and *Dixon*, in the year 1769. It appears, sir that until the year seventeen hundred and forty eight, suits might be brought in the county court for any sum exceeding twenty five shillings current money, or two hundred pounds of tobacco: and actions of trover or detinue without regard to the value of the article converted or detained, in all such actions a capias ad respondendum was the first process issued, authorising the sheriff to take the body of the defendent into his custody and have him before the court at the time when his writ was returnable—in that year a law was passed, chap. 4th,—by the 26 sec. of which it is enacted, "that for the more *speedy* recovery of *small* debts it shall be lawful for the justices of any county court to hear and determine all suits brought for any debt or demand, due by judgment, obligation, or account for any sum or sums of money or tobacco of the value of twenty five shillings current money or two hundred pounds of tobacco, and not exceeding five pounds of like money, or one thousand pounds of tobacco, by *petition* without the *solemnity of a jury*, and where the demand shall not exceed the above mentioned sums, the plaintiff shall proceed by petition, and *not otherwise*," after directing in what manner the claim is to be set forth in the petition—the same section directs that "upon filing such petition in the clerk's office, a summons of course shall be issued returnable to the next court (the courts were then held monthly) a copy of which, together with a copy of the petition—and accounts shall be delivered to the defendant, or left at his or her usual place of abode, ten days at least before the next succeeding court, and the same being returned executed by a sworn officer, or oath made of the due service

thereof, if the defendent do not then appear, it shall be lawful for the said justice to hear and examine into the truth of the matter so complained of, and to determine the cause on the evidence produced, or to dismiss the petition as to them shall seem just.—And if the defendant do appear, he shall forth with put in such answer or plea thereto as will bring the matter of complaint in issue thereupon: Or if he fails to plead, the court shall instantly proceed to hear and determine the cause in a summary way upon such evidence as shall be given and shall give judgment according as the very right of the cause and matter in law shall appear unto them without regard to form or want of form, &c."

By the 22d sec. of the same law, it is enacted " that when any person entitled to an action of trover or detinue shall set forth the value of the thing demanded to be *under the value of five pounds*, in a *petition* to any county court, a *summons* shall issue, and the same proceedings shall be had as in cases for the recovery of small debts. But for the recovery of *any penalty* for the *breaches* of the *penal laws* of the then colony, no change was made as to the mode of instituting the action.—The process of capias to arrest the offender, the right of trial by jury in such actions,—as to these subjects, the law was left as before: and yet actions of this nature were under the consideration of the legislature; for we fiund in sec. 23 of the same law, " that for the easier, speedier and better advancement of justice in obtaining judgments in any such suit or action, where the *penalty* sued for shall not *exceed five pounds*, current money, or *one thousand pounds* of tobacco, if in such suit any *demurrer* shall be joined and entered therein, in any court of record within said *dominion*, the judges shall proceed and give judgment according to the very right of the case, and as the matter of law shall appear to them, without regarding any imperfection, omission or defect, &c. except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same notwithstanding, &c. And that if any *verdict should be given* in any such action or suit, in any court of record in said dominion, the judgment thereupon shall not be staid or reversed for or by reason of any default in the form or want of form, of any writ, &c. any law, statute or usage to the contrary notwithstanding."

And here, sir it may perhaps be proper to observe that in Virginia, at least before the revolution, the *penalties* inflicted for the breach of their *penal* laws, were commonly by the acts themselves directed in what mode to be recovered, which mode was almost universally directed to be " by *information*, bill, plaint, or action of debt, in any court of record within said dominion, wherein no essoin, pretection, or wager of law, privilege, or any more than one imparlance shall be allowed" [Mr. Martin turned to a variety of the penal laws to shew such were the provisions.] This honorable court will perceive that under *these provisions*, the penalties could not be recovered by presentment and indictment, as hath frequently been determined; hence the usual suits or actions resorted to in the courts of Virginia for the recovery of those penalties from the smallest to the greatest, were *informations* or *actions of debts*. And the twenty-third section which I have just read relates to such informations or action of debt, where the penalty should not exceed *five pounds*, and to those only applies such regulations as are thereby made, which however do not alter the form of action or the nature of the process to be issued, even in those cases, but leaves the law in those respects as it was before.

However during the same session in their legislatorial disquisitions, they thought proper to take away the trial

by jury in proceedings *by presentment* to recover penalties not exceeding five pounds,—to give the courts summary jurisdiction in *those cases*; and to take away the process of a capias therein. —And hence having by the first section of chapter seven (see. page 188, laws of Virginia) enabled *grand juries to present breaches* of all *penal laws* of that then colony: by the 2nd section it is thus enacted "that when any offence or offences should be *presented by a grand jury*, and the penalty or forfeiture by law, inflicted thereon shall not exceed five pounds current money or one thousand pounds of tobacco, be it to the king and informer, or to the party and informer only, or appropriated to any other use whatever, such *presentment* need not be drawn up in *other form* than as the same stands *presented by the grand jury*, and thereupon the court shall order *a summons* forthwith to issue, to summons any person, so presented to appear and answer such *presentment* at the next court (as I have before observed, the courts were then held monthly) and shall not admit of any exception or pleading to the form or manner thereof, but shall proceed to trial, without *the formality of a jury*, and give judgment upon such *presentment*, according as the very right of the cause and matter in law shall appear to them; and if the party summoned fails to appear, the court may give judgment for the penalty."

Thus sir, the law of Virginia remained until the revolution, and from this view it will appear that the only cases, where, in personal civil actions, the process was to be by summons, and not by capias, were where debts were claimed not exceeding five pounds or one thousand pounds of tobacco, or property converted or detained not exceeding the same value, in all which cases the suit or action was to be instituted by *petition*, and the *court* was to decide in a *summary* manner without the *intervention of a jury*.

And that the only case, in *criminal* proceedings, where a summons was directed to issue, is where a *presentment* hath been made by *grand jury*, for an offence, *the penalty*, whereon shall not *exceed* five pounds current money, or one thousand pounds of tobacco, which *presentment* need not be drawn up in any *other form*; and on which presentment the court was to decide in a *summary* manner, without the *intervention of a jury*.—This honorable court will also perceive, that the provision of this act directing summons to issue in the case I have stated can only apply to presentments made under the local, penal laws of Virginia where the penalty is restrained to a sum not exceeding five pounds current money, or a thousand pounds of tobacco, and cannot exceed to presentments for offences at *common law*, such as assaults, riots, libels &c, since in all such cases the courts have a discretionary power to fine what sum they think reasonable, and therefore may fine beyond five pounds current money or a thousand pounds of tobacco.—Nor doth the provison exceed to any case even under the penal laws of Virginia where the court may punish by *imprisonment*. Upon this examination of the subject, it appears that until the time of the American Revolution, according to the laws of Virginia a capias remained the proper process in all personal civil actions except where the claims was for money or debts due not exceeding five pounds current money or one thousand pounds of tobacco—or where, in detinue or trover, the plaintiff laid the value of the property not exceeding the aforesaid sum.—And that in *criminal* cases a capias remained the proper process in all proceedings for offences at criminal law;—and for all offences against the acts of the state of Virginia where the court may inflict a fine of more than five pounds current money, or which were punishable by imprisonment.—Having thus shewn what was the law on this subject at the time of the American Revolution,—I have

sir, to examine what charges and alterations have been made therein since that period.

The first law made since the revolution was passed in the year 1792, and is to be found in the edition of the Virginia laws published by Augustine Davis in the the year 1794, page 96, the 37th sec. increases the amount of the debt, which may be recovered by petition in the county, city or Borough court to a sum not exceeding twenty dollars or eight hundred pounds of tobacco, directing process to be by summons and the mode of procedure for recovery of the same as for recovery of small debts before and at the time of the revolution.—The 38th sec. also encreases the value of the property where in trover and detinue, petition may be filed and proceedings be had as before the revolution, to the sum of twenty dollars, or eight hundred pounds of tobacco.

In the same year, an act was passed to be found page 106, by the sixth sec. of which it is enacted, "that in a *presentment* to the county or corporation courts, if the penalty of the offence exceed not five dollars, or three hundred pounds of tobacco; or to the district court, if the penalty exceed not twenty dollars or one thousand pounds of tobacco, *no information* thereupon shall be filed, but a *summons* shall thereupon be issued against the defendant to answer the said *presentment*, and such summons having been served upon him, or a copy thereof having been left at his usual place of abode, and if he doth not appear, judgment shall be given by the court against him for the penalty, and if he doth appear, the court shall in a *summary way*, without the *intervention of a jury* hear and determine" &c. And by the 37th sec. of chapter 74, page 113, there is a general provision, that where no *presentment* may be made, yet where the penalty incurred by the breach of any penal law shall not exceed twenty dollars or eight hundred pounds of tobacco, the same may be sued for, and recovered in the manner, directed by law for debts of like amount.

This clause was designed to prevent informations or actions of debt to be originally instituted for the recovery of penalties not exceeding that sum, where no presentments should be made, and to direct a procedure by petition in which also the process must be a *summons*, and the decision by the court in a summary manner.

One other provision, and one only, hath been made for issuing a *summons*, this is found in the twenty fourth sec. of the same act and runs thus. "No information for a tresspass or misdemeanor, shall be filed in any court, but by express order of the court entered on record, nor unless the party supposed to be culpable shall have failed to appear and show good cause to the contrary, having been required to do so by a *summons* appointing a convenient time for that purpose served upon him, or left at his usual place of abode."

These are the only acts of the Virginia legislature I find on this subject—I believe there are no others.—If there are any more, the honorable managers will be so obliging as to point them out; but presuming that they can produce no further provisions, what is the result of this investigation? that even at this time, the only instances in personal civil actions where summons is the proper process, are where the demand for money due,—or on account of trover or detinue doth not exceed twenty dollars, or eight hundred pounds of tobacco, in which case the proceeding is to be by petition and the court determine in a summary manner without the intervention of a jury:—And in criminal cases, or for recovery of *penalties* for the breach of their *penal* laws the only cases where a summons is the regular process are where the actions are instituted by *presentment of a grand*

jury, on which preſentment no information is to be filed,—or without ſuch preſentment by *petition*, for the recovery of penalties not exceeding twenty dollars or its correſpondent value in tobacco: which caſes can only ariſe under the acts of aſſembly of Virginia, and not where the offences are at common law—nor in any caſe even under the laws of Virginia, where puniſhment may be by impriſonment,—that the only additional inſtance, in which a ſummons is to be uſed in a criminal caſe, is where application is made for an information, and there it is directed in order that the party may have an opportunity to ſhew cauſe why an information ſhall not be ordered againſt him: but even in this caſe, if the information is ordered, a capias is the proceſs to bring the party to anſwer the charge contained in ſuch information,—as it *remains to be in every other criminal proſecution or ſuit except thoſe which I have already particularly deſignated.*

I will now, ſir, turn to the law of the ſtate of Virginia with the violation of which we are charged; but firſt let me premiſe it is moſt erroneouſly ſtated in the article of impeachment,—how this hath happened is not for me to ſay,—but ſuch is the fact—the article of impeachment ſets forth, that "it is provided by the laws of Virginia, that upon preſentment by any grand jury of an offence not capital, the court ſhall order the clerk to *iſſue a ſummons* againſt the perſon or perſons offending to appear, &c. whereas, in truth the words of the law are, "upon preſentment made by the grand jury of an offence not capital, the court ſhall order the clerk to iſſue a ſummons *or other proper proceſs* againſt the perſon or perſons, &c. (See page 112, ſec. 28 ſame edition, laws of Virginia.)

Thus then the very law points out that on ſuch preſentments a ſummons is not in all caſes a proper proceſs, but that a ſummons is to iſſue, or *other proper proceſs*, according to the nature of the offences preſented. That is, as I have already ſhewn, a *ſummons* is to be iſſued where *preſentments* are made for a violation of the penal laws of their ſtate puniſhable by a *fine of not more than twenty dollars*, or its correſponding quantity of tobacco, *nor by impriſonment*; but in all preſentments for *offences at common law*, or for breaches of *their penal laws* puniſhable by *fine beyond twenty dollars*, or *by impriſonment*, in ſuch caſes the clerk *muſt iſſue a capias*, that being the *proper proceſs*.—And upon theſe principles, it has been determined in the circuit court of Columbia, ſitting at Alexandria, acting under the laws of Virginia, that on preſentments for aſſaults and battery, and other common law offences, a capias is the proper proceſs to be iſſued; and this determination has been made while a gentleman of great legal knowledge, a native of Virginia, and who received his legal education in that ſtate (John Thompſon Maſon, Eſq.) proſecuted in that court for the United States, upon whoſe application I preſume the determination was made.

I will now examine the law of the United States paſſed the 24th September, 1789, entitled "an act to eſtabliſh the judicial courts of the United States," ſection, 33, "and be it further enacted, that for any crime or offence againſt the United States, the offender may by any juſtice or judge of the United States, by any juſtice of the peace, or other magiſtrate of the United States, where he may be found, agreeably to the uſual mode of proceſs againſt ſuch offenders in ſuch ſtate, and at the expenſe of the United States, be *arreſted* and *impriſoned*, or *bailed* as the caſe may be, for trial before *ſuch court* of the United States, as by this act has cognizance of the offence: and copies of the proceſs ſhall be returned, as ſpeedily as may be into the clerk's office of ſuch court *together with the recognizances of the wit-*

neſſes for their appearance to teſtify in the caſe, which recognizance the magiſtrate, before whom the examination ſhall be, may require on pain of impriſonment. And if ſuch commitment of the offender, or of the witneſſes ſhall be *in a diſtrict other than that in which the offence is to be tried*, it ſhall be the duty of the judge of that diſtrict where the delinquent is impriſoned, ſeaſonably to iſſue, and of the marſhal of the ſaid diſtrict to execute *a warrant* for the removal of the offender and the witneſſes or either of them, as the caſe may be, to the diſtrict into which the trial is to be had. And upon all *arreſts* in criminal caſes, bail ſhall be admitted, &c. This is the law of the United States mentioned in the fifth article as governing the queſtion now before us,—The baſis on which this article is founded.—The leaſt examination will ſhew that it provides only for the manner in which offenders ſhall be arreſted under warrants iſſued by the judicial officers of the United States or of the different States, upon complaint made to them, in order that ſuch offender may be bailed or committed, and witneſſes bound over to the approaching proper courts, that the offences may be enquired of by a grand jury; and hath no relation to the manner in which proceſs ſhall be iſſued *by a court* to bring in offenders to anſwer to preſentments which are depending in the court.—And a ſimilar proviſion for arreſts in ſuch caſes is made by the acts of aſſembly of Virginia, in that ſtate. (See the 17th ſect. of chap. 67, page 93, ſame edition of Virginia laws.)—

But that the aforeſaid act of congreſs can in no manner relate to or be regulated by any law of Virginia, directing a ſummons to be iſſued as the proper proceſs, appears clearly from this, that the offender is to be *arreſted* and impriſoned, or bailed, according to the nature of his offence; but no perſon can be *arreſted* on *proceſs of ſummons*, or on ſuch proceſs be compelled to give bail, under pain of impriſonment. This can only be done when a *capias*, or a ſimilar proceſs, ſuch as a magiſtrates warrant, or the warrant of a court, called a bench warrant, is iſſued!—And here, ſir, let me explain what is meant by a *bench warrant*.—When a preſentment is made by a grand jury againſt a perſon not impriſoned, nor recognized, proceſs is iſſued to arreſt the offender and bring him before the court then in ſeſſion; as when an application is made to a judge or juſtice out of court, and oath made of an offence committed, it becomes the duty of ſuch judge or juſtice to iſſue *his warrant* to take the offender into cuſtody, and thereby ſecure his appearance at court to anſwer to any preſentment, which may be made againſt him; ſo when a preſentment is made by a grand jury of any offence,—that preſentment being made by the oath of not leſs than twelve of the grand jurors, founded alſo on the oath of witneſſes, it authoriſes the court upon this proof that an offence has been committed, to iſſue proceſs commanding the ſheriff to arreſt the offender preſented and bring him before them, to be bailed or committed according to the nature of the crime with which he is charged. This proceſs is what in Maryland is called a *Bench Warrant*,—it differs from the warrant iſſued by a judge or juſtice in as much as this laſt is directed to a conſtable, the other to a ſheriff;—It differs from the common capias only in this, that the bench warrant is made returnable immediately, that is, during the ſeſſion of the court,—whereas what is commonly called a capias is returnable to the ſucceeding term. And in Maryland it is the conſtant practice of our courts whenever preſentments are made againſt perſons not in confinement or under recognizance, to iſſue ſuch proceſs in *all caſes* from

the higheſt to the loweſt offences in order to ſecure the perſons preſented.

I have ſaid, ſir, that the law relied on by the houſe of repreſentatives in ſupport of this article, doth not relate to proceſs iſſued on *preſentments made* in the courts of the United States; and as a further proof of this, I now refer this honorable court to the fourteenth ſection of the ſame law,—where it is enacted, "That all the before mentioned courts of the United States ſhall have power to iſſue writs of ſcire facias, habeas corpus, and *all other writs*, not ſpecially provided for by ſtatute, *which may be neceſſary for the exerciſe of their reſpective juriſdictions*, and agreeable to the principles and uſages of law." By this proviſion a power is given to the courts of the United States, to iſſue ſuch proceſs as in their diſcretion they ſhall think beſt, ſo that it be conſiſtent with the general principles and uſages of law. And the act of the United States entitled "An act in addition to an act to eſtabliſh the judicial courts of the United States paſſed on the 2d March 1793," in its ſeventh ſection has the following proviſion, to wit, "that it ſhall be lawful for the ſeveral courts of the United States, from time to time, as *occaſion may require, to make rules and orders* for their reſpective courts *directing the return of their writs and proceſſes*, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation, and otherwiſe, in a manner not repugnant to the laws of the United States, to regulate the practice of the ſaid courts reſpectively as ſhall be fit and neceſſary *for the advancement of juſtice*, and eſpecially to that end *to prevent delays* in proceedings" This act gives the court of the United States full power to regulate the return of proceſs as to time and every thing elſe,—the former law gave them the power of iſſuing *ſuch proceſs* as in their judgment and diſcretion they ſhould think moſt proper,—on theſe ſubjects then they are uncontrolled, unreſtrained by the laws or the practice of any ſtates, or ſtate courts. The courts of the United States having this power, can only exerciſe it as the caſe comes before them, they then determine what is right and proper, and that becomes a precedent in ſimilar caſes, and thus it was the court acted in the caſe of Calender, as to the proceſs iſſued and the time of its return, and was perfectly juſtified by the laws of the United States in ſo acting.

The ſixth article alledges that by the laws of Virginia it is provided, that in caſes not capital the offender *ſhall not be held* to anſwer any preſentment of a grand jury until the court next ſucceeding that during which ſuch preſentment ſhall be made, and yet that my honorable client with intent to oppreſs and procure the conviction of Callender, did at the ſaid court at which he was preſented, rule and adjudge him to trial, during the term at which he, Callender, was preſented and indicted, and this, notwithſtanding the proviſions of the thirty fourth ſection of the aforeſaid law of the United States mentioned in the fifth article, which provides "that the laws of the ſeveral ſtates, except where the conſtitution, treaties or ſtatutes of the United States ſhall otherwiſe require or provide, ſhall be regarded as the rules of deciſion in trials at common law in the courts of the United States where they apply."

In anſwer to this charge, ſir, permit me to ſtate there is no law of Virginia that declares the offender preſented for an offence not capital, *ſhall not be tried until the ſucceeding term*; it is only an inference, which that honorable body, who formed the articles of impeachment, have made from the ſuppoſition that in all ſuch caſes a *ſummon*

only could be iſſued,—returnable to the ſucceeding term, and in conſequence that the offender could not be compelled to go to trial before the ſucceeding term.

But, ſir, I have already ſhewn that ſummons was not the proper proceſs in Callender's caſe; that the laws of Virginia were not in the leaſt degree operative on either the proceſs to be iſſued, nor the time or the manner of its return, but that the one and the other was ſolely in the power of the court, veſted in them by the laws of the United States, unreſtrained by any law of the ſtate of Virginia. Thus then the premiſes failing from which the inference was drawn, the inference of courſe muſt be rejected. Thus then the court being unreſtrained by any law of Virginia or from any inference drawn therefrom, not only had a right to try Callender the ſame term he was indicted, but were bound in duty ſo to do, unleſs there was ſome good cauſe to juſtify the delay. When a preſentment is made, there is ſuch evidence that a crime has been committed, as to authoriſe the court, nay to make it their duty (as I have before obſerved) to iſſue proceſs to *arreſt* the criminal to prevent his eſcape from juſtice; our laws are not founded on the principle that the offender may have an opportunity to eſcape and elude juſtice; and hence it is that a grand jury is ſworn to ſecrecy as to their deliberations, leſt thoſe offenders againſt whom enquiries are making, getting information of that fact may run off before they can be ſecured.—And when the criminal is arreſted and brought into court it is the duty of the court both as to the criminal and the public to have the cauſe decided as ſoon as can be conſiſtent with juſtice. And now let me turn to the 34th ſection of the judiciary law of the United States which is introduced in this article and on which reliance is placed by that honorable houſe which prepared theſe articles,—it is as follows, "That the laws of the ſeveral ſtates, except where the conſtitution, treaties, or ſtatutes of the United States, ſhall otherwiſe require or provide, ſhall be regarded as rules of deciſion in trials at *common law* in the courts of the United States *in caſes where they apply*." I ſhall not, ſir, enter here into a diſcuſſion whether a proſecution for the violation of a penal law of the United States can be with propriety, within the meaning of this act, called a proceeding at common law. Nor ſhall I, ſir, rely as I might do upon the obſervation that they are only to "be regarded *in caſes where they apply*," and that it is the court and the court only who are to determine in what caſes they do apply; in doing which they are only required to exerciſe impartially their legal diſcretion; but I ſhall aſk whether this law in any manner relates to the proceſs to be iſſued to bring into court the party to the ſuit antecedent to the trial, to compel him to appear in order that a trial may be had? I preſume not. The proviſions for that purpoſe are to be found in the 14th ſection of the law of Sept. 24th, 1789—and in the ſection of the law of March 2d, 1793, which I have already cited and which regulate not only the iſſuing but the returning of proceſs to bring the party into court, to anſwer to the charge whether civil or criminal. According to my judgment, ſir, the law in queſtion means, only to declare that the rules and deciſions of the ſtate courts in any queſtion as to the right of the parties ſhall be reſpected and attended to in ſimilar queſtions, which may come into controverſy in the courts of the United States, in their reſpective diſtricts or circuits as far as they ſhall be thought to apply, in caſes at common law.—That is if two caſes exactly ſimilar are in litigation, as to civil rights, the one in the ſtate court, the other in the diſtrict or circuit court held in the ſame ſtate, there ought to be in each caſe the ſame deciſion; and

that where the law in the caſe had been ſettled by antecedent ſtate deciſions, the judges of the United States ſhould reſpect thoſe deciſions.—And alſo that when the courts of the U. States, try a cauſe in any diſtrict or any circuit, the rights of the parties are to be decided according to the laws of the ſtates under which the rights were acquired, as ſettled by the legal deciſion of the ſtate courts, where deciſions have been had.—To exemplify my ideas, if the courts of the United States have on any occaſion to determine either immediately or incidentally a right ariſing under a deviſe of lands in Maryland, they muſt determine the deviſe void, unleſs the will was atteſted by three witneſſes. But if the deviſe was of lands in Virginia, the courts would be obliged to determine the deviſe good, although atteſted in a different manner.—So alſo the obligation contracted by the execution of a promiſſory note is different if executed in Virginia, from what it is, if executed in Maryland.—Upon actions therefore which may be inſtituted in the courts of the United States in ſuch caſes, theſe courts ought to conſider what are the rights of the parties according to the laws of the ſtates where the tranſactions took place—and where there have been deciſions of the ſtate courts upon the ſubject matter, or any deciſions, which may be conſidered as having a bearing on the queſtion, the United States' courts are to regard ſuch deciſion as far as they think they are *applicable*.

Thus, ſir, I flatter myſelf, that I have upon the fifth and ſixt articles ſhewn, that there was no law of Virginia by which the conduct of the judge was to be regulated,—and that even if the laws of that ſtate had been operative, they have not been according to their true conſtruction, in any degree violated.

But ſurely it can never be ſeriouſly contended, that where a gentleman is appointed a judge of the United States, he is thereby expected to become perfectly acquainted with all the local laws, uſages and deciſions of every ſeperate ſtate in the union—no ſuch judge by any poſſibility can be had—however great the legal knowledge of any gentleman, it has been generally confined to the laws, to the practice—the judicial proceedings of his own ſtate, and to the common law as there uſed and introduced.—From the perfect conviction of this truth, the diſtrict judge is appointed an inhabitant of the ſtate which compoſes the diſtrict—he is ſuppoſed to know the particular laws, uſages and deciſions of his ſtate.—It is to him or the diſtrict attorney in his abſence, the judge of the ſupreme court, when he goes to hold the circuit court, is expected to apply for information, as to what relates to theſe ſubjects,—and thus we find judge Chaſe correctly acting,—for the diſtrict judge being abſent, when Callender was preſented, we find my honorable client conſulting with the diſtrict attorne y, whoſe political principles certainly did not lead him to wiſh to oppreſs Callender,—and alſo with the clerk of the diſtrict court, who is himſelf a gentleman of legal knowledge and a proſecutor in one of the ſtate courts in Virginia,—and it was under their advice and with their approbation that the proceſs was iſſued, of the nature uſed, and returnable in the manner we have ſeen.—In fine, ſir, it is impoſſible for the judges of the ſupreme court to have even a general knowledge of the particular ſtate laws and practices, and if in conſequence of that want of knowledge they were to be ſubject to impeachment, you would not be able to prevail upon any reſpectable character to accept the appointment. But I do not apprehend ſir, that the honorable ma-

nagers place much reliance at this time on theſe two articles. Nor do I believe the honorable houſe of repreſentatives would have either adopted them or any of the articles, which have been brought forward againſt judge Chaſe, had the ſame evidence been before them which hath been produced to this honorable court.

In ſaying this I do not mean in the ſlighteſt degree to cenſure that honorable body, they were acting as a grand inqueſt of the nation—they only had, and only could have, before them *ex-parte* evidence. On the evidence which they had before them, I ſhall not ſuggeſt but what there was ſufficient foundation for bringing forward the charges:—But theſe charges have been patiently diſcuſſed,—a maſs of evidence hath been produced here, which they had not, and after this full inveſtigation, the honorable members who impeached him, and who have regularly attended his trial, I doubt not are perfectly ſatisfied that he ought to be acquitted, and will rejoice at that acquittal.

Before I conclude, let me add one other proof that the framers of the conſtitution never intended that juries ſhould have any power to decide the law contrary to the inſtructions of the court, much leſs to decide on the *conſtitutionality* of a law. By the *ſecond ſection* of the *third* article of the conſtitution of the United States it is provided, that in all caſes to which the judicial power applies, except caſes affecting ambaſſadors, other public miniſters and conſuls, and thoſe in which a ſtate is a party, "the ſupreme court ſhall have *appellate juriſdiction*, both as to law and *fact*, with ſuch exceptions and under ſuch regulations as congreſs ſhall make."

Thus therefore it is in the power of congreſs to authoriſe, in all ſuch caſes, an *appeal* to the ſupreme court *even as to the fact* from the *verdict of a jury*,—and empower the ſupreme court to control the jury if they appear to have erred.—And ſuch was the intention of the framers of the conſtitution.

They aſſumed as a principle, that the intereſts of the ſtate governments and of the general government would often be at variance, that laws paſſed by the United States, the moſt wiſe and ſalutary, might be very obnoxious to, and unpopular in, ſome of the ſtates—judges holding their commiſſions under the reſpective ſtates, that is the ſtate judges, the framers of the conſtitution would not therefore intruſt with the execution of the laws of the United States—They alſo conſidered that as far as juries were introduced, the jurors would be citizens of the reſpective ſtates wherein the trials ſhould be had—that they would in conſequence probably partake of the intereſts, the prejudices and the paſſions prevailing in the ſtate, and therefore might decide contrary to the direction of the judges appointed by the United States, and thereby prevent the due execution of their laws. To obviate this, the conſtitution has a proviſion for an appeal to the ſupreme court even from the verdict of ſuch a jury.—Judge then whether the framers of the conſtitution ever contemplated giving power to counſel, to argue to jurors *againſt the opinions of their judges—or to juries to decide againſt ſuch opinions!*

I have now only to return to this honorable court my ſincere thanks for the patient attention with which they have indulged me on this occaſion,—and to expreſs to you, Mr. Preſident, the high ſenſe I have of the impartiality, politeneſs and dignity with which you have preſided during this trial.

Mr. HARPER,

It was greatly to be defired, Mr. Prefident, and might have been confidently expected, that in a cafe every way fo important, where it fo greatly concerns the public happinefs, that the decifion fhould command the public confidence, nothing would be prefented to the view of this honorable court, in aid of the profecution, except the law which ought to govern the decifion, and the proofs relied on for fupporting the allegations.

But it has not fo feemed good to the honorable managers. They have thought proper to introduce into the difcuffion, the political opinions and party connections of the refpondent, for the purpofe of throwing a fhade of doubt over his motives, and of eftablifhing inferences unfavorable to his character. How far this conduct ought to be commended, it is not for me to decide. My confidence in the juftice and difcernment of this honorable court, forbids me to apprehend that it can be fuccefsful.

But fince thefe opinions and connections have been introduced, permit me to ufe them for a different purpofe.

The duty impofed on judges is at all times delicate: And in criminal cafes, where life or liberty may be affected, where reputation dearer than both depends on the iffue, this duty becomes peculiarly arduous and painful, to an honorable and generous mind. But if there be a fituation more delicate more embarraffing than every other, to fuch a mind, it is that of a judge fitting on the trial of a perfon, who, from political oppofition, or any other caufe, may have excited angry or hoftile feelings in his mind. It is then that he moft fears to truft himfelf. It is then that he moft dreads the influence of his paffions, in mifleading his judgment. It is then that he feels the ftrongeft alarms for his reputation, left he fhould poffibly afford ground for the fufpicion, that he had gratified his refentment, under the femblance of executing the law.

Hence he conftantly leans towards the fide of the accufed, and requires the cleareft conviction before he condemns. Hence he rejects all doubtful or contradictory teftimony; lays out of the cafe all little indifcretions and flight fhades of fufpicion; and is rigid in requiring from the profecutors, the unequivocal proof of unequivocal offences. That his enemy is in his power, is always a reafon for the utmoft forbearance. The fear that he may poffibly be mifled by his paffions, is always a reafon for acquittal, where doubt can exift.

Need I invoke thefe noble and generous fentiments, in the breafts of this honorable court? No! My heart tells me that I need not. I fee on thofe benches diftinguifhed foldiers and eminent ftatefmen, who have triumphed alike in the fields of politics and war, and who always difdained to tarnifh their laurels, by the blood or the humiliation of a vanquifhed foe.

If then the perfon now arraigned at your bar, be connected with a political party, in oppofition to any of thofe who fit as his judges: If it were poffible that in promoting the views of that party, he may have excited feelings of anger or reſentment, in the minds of any honorable member of this tribunal: If it were poffible that any portion of the angry paffions, engendered by the conflicts of party, could find a place within thefe hallowed walls, and could attach to him who ftands upon his trial at this bar: The exiftence of fuch a poffibility, would furnifh every member of this honorable court, with the ftrongeft motives that can operate on a generous and noble mind, for leaning conftantly to the fide of the accufed, and for pronouncing in favor of an acquittal, wherever there remains a doubt of guilt.

Attempts have alfo been made, to inlift the fympathy of this honorable court, on the fide of the profecution; and for this purpofe a criminal twice convicted, who did not hefitate to rifk civil bloodfhed in fupport of political theories, and is now indebted for his life to the clemency of that government, againft whofe laws he armed his ignorant and mifguided neighbors, is prefented to view, decked out in all the ornaments which rhetoric can beftow. We, Mr. Prefident, difclaim the aids and proteft againft the interference, of rhetoric and fympathy. However proper in other fituations, they ought to be

excluded from courts of juſtice ; whoſe deciſions ſhould be governed by truth, and not by feeling.

But if ſympathy could find a place in this tribunal, what object more fit to awake it, than that now preſented at your bar!

An aged patriot and ſtateſman, bearing on his head the froſt of *ſeventy* winters, and broken by the infirmities brought on him by the labors and exertions of half a century, is arraigned as an offender, and compelled to employ in defending himſelf againſt a criminal proſecution, the few and ſhort intervals of eaſe allowed to him by ſickneſs. Placed at the bar of a court, after having ſat with honor for ſixteen years on the bench, he is doomed to hear the moſt opprobious epithets applied to his name, by thoſe whoſe predeceſſors were accuſtomed to look up to him with admiration and reſpect, and whoſe fathers would have been proud to be numbered among his pupils. His footſteps are hunted from place to place, to find indiſeretions which may be exaggerated into crimes.—The jeſts which, flowing from the gaiety and openneſs of his temper, were uttered in the confidence of private converſation ; the expreſſions of warmth produced by his his natural impetuoſity of character ; are detailed by companions converted into ſpies and informers, and are adduced as proofs of criminal intention.

This cup, ſo full of bitterneſs, for one accuſtomed during forty years to fill the moſt honorable ſtations in his country, he drinks to the dregs without complaining. In this ſad reverſe, he ſupports himſelf with a calmneſs & a fortitude & a reſigned dignity, which melt the hearts of thoſe who are not his enemies, and extort the reſpect of thoſe who are.

If ſympathy muſt be excited, here let it find a nobler object. If from generous breaſts it cannot be excluded, let it be turned towards " A brave man ſtruggling with the ſtorms of fate ;" and greatly ſupporting himſelf under the preſſure of evils, the moſt afflicting that an elevated mind can know.

Not content with endeavoring to blow up a flame of party ſpirit againſt the reſpondent, and to engage ſympathy in the ungracious and to her unnatural taſk, of aiding a criminal proſecution, the honorable managers have reſorted to a principle, as novel in our laws and juriſprudence, as it is ſubverſive of the conſtitutional independence of the judicial department, and dangerous to the perſonal rights and ſafety, of every man holding an office under this government. They have contended " that an impeachment is not a criminal proſecution, but an enquiry in the nature of an inqueſt of office, to aſcertain whether a perſon holding an office, be properly qualified for his ſituation ; or whether it may not be expedient to remove him."* But if this principle be correct ; if an impeachment be, indeed, not a criminal proſecution, but a mere inqueſt of office ; if a conviction and removal on impeachment be, indeed, not a puniſhment, but the mere withdrawal of a favor once granted ; I aſk why this formality of proceeding, this ſolemn apparatus of juſtice, this laborious inveſtigation of facts ! If the conviction of a judge on impeachment, be not to depend on his guilt or innocence of ſome crime alledged againſt him, but on ſome reaſons of ſtate policy or expediency, which may be thought by the houſe of repreſentatives and two-thirds of the ſenate to require his removal, I aſk why the ſolemn mockery of articles alledging high crimes and miſdemeanors, of a court regularly formed, of a judicial oath adminiſtered to the members, of the public examination of witneſſes & of a trial conducted in all the uſual forms ? Why not ſettle this queſtion of expediency, as all other queſtions of expediency are ſettled, by a reference to general political conſiderations, and in the uſual mode of political diſcuſſions ? No, Mr. Preſident ! This principle of the honorable managers, ſo novel and ſo alarming ; this deſperate expedient, reſorted to as the laſt and only prop of a caſe, which the honorable gentlemen feel to be unſupported by law or evidence ; this forlorn hope of the proſecution, preſſed into its ſervice after it was found that no

* *This principle was advanced and inſiſted on by Mr. Campbell, one of the managers, and nearly in theſe words.*

offence againſt any law of the land could be proved; will no,t cannot avail. Every thing by which we are ſurrounded, informs us that we are in a court of law. Every thing that we have been for three weeks employed in doing, reminds us that we are engaged, not in a mere enquiry into the fitneſs of an officer for the place which he holds, but in the trial of a criminal caſe, on legal principles. And this great truth, ſo important to the liberties and happineſs of this country, is fully eſtabliſhed by the deciſions of this honorable court, in this caſe, on queſtions of evidence; deciſions by which this court has ſolemnly declared, that it holds itſelf bound by thoſe principles of law, which govern tribunals in ordinary caſes. Theſe deciſions we accepted as a pledge, and now rely on as an aſſurance, that this cauſe will be determined on no newly diſcovered notions of political expediency, or ſtate policy, but on the well ſettled and well known principles of law.

The honorable managers, indeed, are as much at war with themſelves on this point, as with the conſtitution and the law. For when they have told us in one breath, that this is merely a queſtion of policy and expediency, they reſort in the next to legal authorities, both Engliſh and American, for the purpoſe of explaining the doctrine of impeachment, and of proving that the acts alledged againſt the reſpondent, amount to impeachable offences: thus paying an involuntary homage to truth, and furniſhing an inſtance of the irreſiſtible power with which ſhe forces herſelf on the mind, even when moſt obſtinately determined to repel her. Let us alſo, Mr. Preſident, be permitted to adduce the authority of an elementary writer, of very high authority, on the laws of England, in ſupport of the principle for which we contend. Wooddeſon in his lectures, vol. 2. page 611. treating on the law of impeachment, ſpeaks thus—"As to the trial itſelf, it muſt of courſe vary in external ceremony, but differs not in eſſentials from criminal proſecutions, before inferior courts. The ſame rules of evidence, the ſame legal notions of crimes and puniſhments, prevail. For impeachments are not framed to alter the law, but to carry it into a more effectual execution, where it might be obſtructed by the influence of too powerful delinquents, or not eaſily diſcerned in the ordinary courſe of juriſdiction, by reaſon of the peculiar quality of alledged crimes. The judgment therefore is to be ſuch, as is warranted by legal principles or precedents. In capital caſes the mere ſtated ſentence is to be ſpecifically pronounced." Thus far this learned profeſſor and commentator of the law of England: and he cites as authorities for this doctrine Selden and the ſtate trials; the latter of which this honorable court need not be informed, is a collection of adjudged caſes in the higheſt courts of England; and the former a writer of great learning and very high authority; peculiarly tenacious of every principle tending to the ſecurity of public liberty, and not likely to miſtake on a point ſo eſſential as the law of impeachment.

Thus we find that even in England, where the power of impeachment is ſubject to no expreſs conſtitutional reſtrictions; and where abuſes of that power, for the purpoſe of party perſecution and ſtate policy, have ſometimes been committed, and more frequently attempted; an impeachment has never been conſidered as a mere inqueſt of office, but always as a criminal proſecution; differing not in eſſentials from thoſe which are carried on before the ordinary tribunals of juſtice, and ſubject to the ſame rules of evidence, and the ſame legal notions concerning crimes and puniſhments: As a proceeding contrived, not to alter the law, but to carry it into more effectual execution. Thoſe authorities, ſanctioned by the practice of 150 years, prove the principle for which we contend. Inſtances may no doubt be found in the hiſtory of that country, where theſe ſalutary principles have been diſregarded, and impeachments have been converted into engines of oppreſſion. But the abuſe does not deſtroy or impair the principle. That remains, eternal as the laws of reaſon and juſtice on which it is founded; while the abuſe paſſes into oblivion, with the temporary intereſts and fleeting projects which it was made to ſubſerve; or remains in our recollection, as a ſad monument of the exceſſes into which frail man is hurried by his paſſions.

And has not this great principle of Engliſh juriſprudence, which in that country has weathered ſo many ſtorms of faction, revolution and civil war, received the ſanction alſo of this honorable court? Has not teſtimony been rejected, becauſe it was judged illegal, according to the ordinary rules of evidence?—and how could thoſe rules apply to this caſe, unleſs it were conſidered as a criminal proſecution?

The conſtitution of the United States will as little bear out the managers in this poſition, as the laws of England. That conſtitution gives the power of impeachment to the Houſe of Repreſentatives, and to the Senate the power of trying impeachments. Had the authors of that inſtrument, and thoſe who adopted it, intended to leave the power at large, or to erect it into a general inqueſt, for enquiring into the qualifications of judges, and the expediency of removing them, nothing more would have been done than merely to give the power. But it will be found that various reſtrictions are impoſed, in the ſubſequent parts of the inſtrument; which prove that no perſon can be impeached, except for an offence.

Thus, for inſtance, in ſpeaking of the power of pardoning, the conſtitution provides (Article II. Sect. II.) that the preſident may "grant reprieves and pardons for *offences* againſt the United States, except in caſes of impeachment." Is not this the ſame thing as ſaying, that caſes of impeachment are caſes of offences? What, Mr. Preſident, are offences, in the language of the conſtitution and the laws? For a definition of the term "offence," in a conſtitutional ſenſe, we muſt conſult our law books, and not the caprice or the varying opinions of popular leaders, or popular aſſemblies. Thoſe books tell us, that the word "offence" means ſome violation of law. Whence it evidently follows, that no officer of government can be impeached, unleſs he have committed ſome violation of the law, either ſtatute or common. It is not neceſſary for me to contend, that this offence muſt be an indictable offence. I might ſafely admit the contrary, though I do not admit it: and there are reaſons which appear to me unanſwerable in favor of the opinion, that no offence is impeachable, unleſs it be alſo the proper ſubject of an indictment. But it is not neceſſary to go ſo far; and I can ſuppoſe caſes where a judge ought to be impeached, for acts which I am not prepared to declare indictable. Suppoſe, for inſtance, that a judge ſhould conſtantly omit to hold court; or ſhould habitually attend ſo ſhort a time each day, as to render it impoſſible to diſpatch the buſineſs: it might be doubted whether an indictment would lie for thoſe acts of omiſſion, although I am inclined to think that it would. But I have no heſitation in ſaying, that the judge in ſuch a caſe ought to be impeached. And this comes within the principle for which I contend; for theſe acts of culpable omiſſion, are a plain and direct violation of the law, which commands him to hold courts a reaſonable time, for the diſpatch of buſineſs; and of his oath, which binds him to diſcharge faithfully and diligently the duties of his office.

The honorable gentleman who opened the caſe on the part of the proſecution, cited the caſe of habitual drunkenneſs and profane ſwearing, on the part of a judge, as an inſtance of an offence not indictable, and yet puniſhable by impeachment. But I deny his poſition. Habitual drunkenneſs in a judge, and profane ſwearing in any perſon, are indictable offences, and if they were not, ſtill they are violations of the law. I do not mean to ſay that there is a ſtatute againſt drunkenneſs or profane ſwearing; but they are offences againſt good morals, and as ſuch are forbidden by the common law. They are offences in the ſight of god and man, definite in their nature, capable of preciſe proof, and of a clear defence.

The honorable managers have cited a caſe decided in this court, as an authority to prove, that a man may be convicted on impeachment, without having committed an offence. I mean the caſe of judge Pickering. But that caſe does not ſupport the poſition. The defendant there was charged with habitual drunkenneſs, and groſs miſbehavior in court, ariſing from this drunkenneſs. The defence ſet up was that the defendant was inſane, and that the inſtances adduced of intoxication and improper behavior, proceeded

from his infanity. On this point there was a contrariety of evidence. It is not for me to enquire on which ſide the truth lay. But the court, by finding the defendant guilty, gave their ſanction to the charge, that his infanity proceeded from habitual drunkenneſs. This caſe, therefore, proves nothing further, than that habitual drunkenneſs is an impeachable offence.

As little aid can the honorable gentlemen derive from the caſe of judge Addiſon, on which alſo they have relied. The articles of impeachment will ſhew, that judge Addiſon was not impeached, as the honorable gentlemen ſuppoſe, for rude and ungentleman-like behavior in court, to one of his colleagues; but for a ſuppoſed uſurpation of power, in preventing his colleague, by an exertion of authority, from exerciſing the right which he was ſuppoſed to poſſeſs, to charge a grand jury; and in exerting his official influence and power, to prevent the jury from paying attention to the legal opinions expreſſed by his colleague, in a civil caſe. The report of that trial, now in my hand, will atteſt the correctneſs of this ſtatement; and will ſhew alſo, that judge Addiſon was ſo far from being charged with rude and ungentleman-like behaviour to his colleague, that the honorable gentleman himſelf, towards whom that behavior is ſuppoſed to have been uſed, and who gave evidence on the trial, bore teſtimony to the mildneſs and politeneſs of judge Addſon's manner, on the occaſion which furniſhed the grounds of impeachment. Whether the acts done by that learned and diſtinguiſhed judge, did amount to an uſurpation of unconſtitutional power; or whether his colleague did poſſeſs thoſe rights, in the exerciſe of which he was ſuppoſed to have been improperly reſtricted; are queſtions foreign from the preſent enquiry? But I am free to declare that if Judge Addiſon's colleague did poſſeſs thoſe rights; and if he did arbitrarily prevent and impede the exerciſe of them, by an unconſtitutional exertion of the powers of his office; he was guilty of an offence for which he might properly be impeached: becauſe he muſt, in that caſe, have acted in expreſs violation of the conſtitution and laws.

The great principle for which we contend, and which is ſo ſtrongly ſupported by the clauſe of the conſtitution already cited, that an impeachment is a criminal proſecution, and cannot be maintained without the proof of ſome offence againſt the laws, pervades all the other proviſions of the conſtitution, on the ſubject of impeachment. The fourth ſection of the ſecond article declares, that "the Preſident, Vice-Preſident, and all civil officers of the United States, ſhall be removed from office, on impeachment for, and *conviction* of, treaſon, bribery, or other high crimes and miſdemeanors." This proviſion, I know, has been conſidered by ſome, as a mere direction what ſhall be done in thoſe ſpecified caſes; and not as a prohibition, confining impeachments to thoſe caſes. But it muſt be recollected, Mr. Preſident, that the conſtitution is a limited grant of power; and that it is of the eſſence of ſuch a grant to be conſtrued ſtrictly, and to leave in the grantors all the powers, not expreſsly or by neceſſary implication granted away. In this manner has the conſtitution always been conſtrued and underſtood: And although an amendment was made, for the purpoſe of expreſsly declaring and aſſerting this principle, yet that amendment was always underſtood by thoſe who adopted it, and was repreſented by the eminent character who brought it forward, as a mere declaration of a principle inherent in the conſtitution, which it was proper to make, for the purpoſe of removing doubts and quieting apprehenſions. When therefore the conſtitution declares, for what acts an officer ſhall be impeached, it gives power to impeach him for thoſe acts; and all power to impeach him for any other cauſe, is withheld. The enumeration in the affirmative grant, implies clearly a negative reſtriction, as to all caſes not enumerated. This proviſion of the conſtitution, therefore, muſt be conſidered, upon every ſound principle of conſtruction, as a declaration that no impeachment ſhall lie, except for a crime or miſdemeanor; in other words for a criminal violation of ſome law.

The ſame idea is found in the ſecond ſection of the third article, third clauſe; where it ir declared that "the trial of all *crimes*, except in caſes of impeachment, ſhall be by jury:" Plainly implying that caſes of impeachment, are caſes of "trials for crimes."

It is material alſo, Mr. Preſident, to advert to the peculiar force of the term "conviction," which is employed in ſeveral parts of the conſtitution, in application to caſes of impeachment. The third ſection of the firſt article, ſixth clauſe, ſpeaking of the trial of impeachments, ſays, "and no perſon ſhall be *convicted* without the concurrence of two thirds of the members preſent." The ſeventh clauſe of the ſame ſection, treating on the extent and operation of a judgment in impeachment, ſays, "But the party *convicted* ſhall nevertheleſs be liable and ſubject, &c." And the fourth ſection of the ſecond article declares, that certain officers "ſhall be removed from office, on impeachment for and conviction of treaſon, bribery, &c." This term *conviction* has in our laws a fixt and appropriate meaning. There is indeed no word in our legal vocabulary, of more technical force. It always imports the deciſion of a competent tribunal, pronouncing a perſon guilty of ſome ſpecific offence, for which he has been legally brought to trial. In an inſtrument ſo remarkable as the conſtitution of the United States, for technical accuracy in the uſe of terms, the frequent and indeed conſtant uſe of this word, is deciſive to prove, that in the intention of the framers of that inſtrument, no man could be impeached except for ſome offence againſt law, of which he might in legal language be ſaid to be convicted.

In fixing the conſtruction of this inſtrument, no ſafer guide can be followed, than contemporaneous expoſitions, furniſhed by thoſe who made or who ratified it; and among thoſe expoſitions, the moſt authoritative are to be found in the conſtitutions of the ſeveral ſtates, formed about the ſame time, and drawn up in many inſtances by the ſame perſons. Wherever it appears clearly, from the context of thoſe conſtitutions, that they affix a certain meaning to particular terms, we may ſafely infer that thoſe or ſimilar terms, in the conſtitution of the United States, were intended to have the ſame meaning. And we ſhall find by inſpecting the conſtitutions of the ſeveral ſtates, that impeachment has been conſidered by all of them, as a criminal proſecution, for the puniſhment of defined offences againſt the laws.

Let us begin with that of Pennſylvania. In treating of impeachments, article the fourth, it ſpeaks of *conviction* on impeachmeut; and declares that "all civil officers ſhall be liable to impeachment for any *miſdemeanor* in office." The term "miſdemeanor" is of as accurate meaning, and of as much technical force, as any term in the law. It deſcribes a claſs of offences againſt law, as well defined as any in the criminal code. A ſtill ſtronger argument is furniſhed by the ſecond ſection of the fifth article; which provides that "for any reaſonable cauſe, which ſhall not be ſufficient ground of impeachment, the governor may remove any of the judges, on the addreſs of two-thirds of each branch of the legiſlature." It is moſt manifeſt that this proviſion would have been wholly unneceſſary, had the people of Pennſylvania in framing their conſtitution, conſidered impeachments, like the honorable managers, merely as inqueſts of office, by which a judge might be removed for any cauſe, which two thirds of each branch might think reaſonable. And the arguments derived from the conſtitution of Pennſylvania have more force, in as much as the terms "miſdemeanor in office," uſed by it for deſcribing impeachable acts, are much leſs ſtrong than "treaſon, bribery and other high crimes and miſdemeanors," employed by the conſtitution of the United Statest for the ſame purpoſe.

The conſtitution of Delaware, ſection 22, directs, that impeachments ſhall lie againſt all perſons "*offending* againſt the ſtate, either by mal adminiſtration, corruption, or other means by which the ſafety of the ſtate may be endangered." This is a very broad deſcription of impeachable acts. And yet it is clear from the context, that thoſe general words were intended to expreſs ſpecific offences againſt the laws, liable to puniſhmen in the regular courſe of juſtice. It is declared that all impeachments ſhall be commenced, "within eighteen months after the *offence* committed;" and ſhall "be proſecuted by the attorney general, or ſuch other perſons as the houſe of aſſembly ſhall appoint, "*according to the laws of the land.*" Perſons found guilty on impeachment, are to be disqualified or removed, "or ſubjected to ſuch pains and pe-

halties as the laws shall direct." And the term "conviction," whose peculiar technical force has been already remarked, is applied by this constitution to cases of impeachment.

The people of Maryland did not think fit, to invest their legislature with the power of impeachment; but have directed by their bill of rights, section 30, and by their constitution, section 40, that misbehavior in office shall be proceeded against by indictment, in a court of law only; and that removal, and in some cases disqualification, shall be the consequence of *conviction*. It will not be denied that misdemeanor and misbehavior in office, are convertible terms. If there be any difference, the latter is the less strong: and yet the people of Maryland have declared, that the term "misbehavior in office," means an indictable offence, of which a person may be *convicted* in a court of law.

The constitution of Virginia provides, that persons offending against the state by mal administration, corruption, or other means by which the safety of the state may be endangered," shall be impeachable by the house of delegates, "in the general court, according to the laws of the land," and that "if all or any of the judges of the general court should, on good grounds, (to be judged of by the house of delegates,) be accused of any of the *crimes* or *offences* above mentioned, such house of delegates may in like manner impeach the judge or judges so accused, to be tried in the court of appeals." Hence it appears most clearly, that those general words, "offending against the state by mal administration, corruption, or other means by which the safety of the state may be endangered," words far more general and indefinite in themselves, than those employed by the federal constitution, were considered by the people of Virginia as meaning specific crimes or offences, which might be preceded against in a court of law, according to the usual course of criminal justice. The words "any other means by which the safety of the state may be endangered," are certainly broad enough to embrace those reasons of political expediency and state policy, for which the honorable managers contend that a judge may be removed by impeachment; but we find that the people of Virginia had no idea of giving them a construction, so contrary to all the notions entertained in this county, respecting legal rights, personal safety and constitutional liberty

The provision made on this subject by the constitution of North Carolina, breathes the same spirit. That instrument declares, section 23, "that the governor and other officers, offending against the state, by violating any part of this constitution, mal administration, or corruption, may be prosecuted on the impeachment of the general assembly, or presentment of the grand jury of any court of supreme jurisdiction, in this state." This plainly implies that impeachable acts, though described in terms the most indefinite, were neither more nor less than offence indictable in the ordinary course of law.

The constitution of Georgia contains no words, which can operate in any manner to define or describe impeachable offences. It merely limits who shall have the power of impeaching, who shall try impeachments, and what description of persons may be impeached. But in that of Vermont there is a provision on this subject, which though very concise, is very strong to our present purpose. Among the powers given by it, section 9, to the house of representatives, is that to "impeach state criminals." This term "criminal," which in our laws is never applied, except to a person's charged with offences of the highest nature, sufficiently declares that the people of Vermont, considered impeachments as applicable to cases of crimes only, and not to removals for reasons of state expediency: Not even to cases of smaller offences, much less of indiscretion or impropriety of conduct, such as is alledged against the respondent in this case: for surely it would be an abuse of language, to apply the term "criminal" to improper interruptions of counsel; to rude hasty or intemperate expositions; to ridicule employed by a judge against counsel, who, in his opinion, conducted themselves incorrectly; or to the precipitate and ill-timed expression of a correct legal opinion. No Sir. This word imports the intentional violation of some known law; the perpetration of some specific defined crime;

which may admit of precise proof, which every citizen may be able to avoid, and against which, when accused of it, he may he may know how to make his defence.

Such, Mr. President, is the solemn exposition of impeachable offences, given by the people of the United States, through the medium of their constitutions.—Though not much accustomed to talk about the will of the people, there is no man who bows with more reverence to that will, when constitutionally declared. And shall we, Mr. President, let go this sheet-anchor of personal rights and political privileges, to commit ourselves to the storms of party rage, personal animosity, and popular caprice? Shall we throw down this great land-mark, fixed by the wisdom and patriotism of our fellow-citizens and fathers? Instead of having our best and dearest rights secured, by fixed and known principles of law, shall we leave them to be governed and disposed of, by the ever varying whims and passions of the moment? No, Sir, I trust not. When I look through those benches, and recollect how deep a stake the members of this honorable court have in those rights, which form the palladium of our safety, and are now entrusted to their care and keeping, I cannot but confidently expect, that they will feel the whole importance of the great trust reposed in them by their country;—that they will regard themselves as acting for future generations, as well as for the present age; & will elevate themselves above the sphere of little views and momentary feelings. They will recollect, sir, that unjust principles, adopted to answer particular purposes, are two-edged swords, which often rebound on the head of him who strikes with them; and that justice, though it may be an inconvenient restraint on our power, while we are strong, is the only rampart behind which we can find protection, when we become weak. They will remember that power which depends on popular favor, is of all sublunary things the most fleeting and transient: that it must from time to time change hands: and that when the change, which sooner or later must arrive, shall have taken place; when those who now direct the thunder of impeachment, shall be placed, as e'er long they must, in a situation to be smitten by its bolts; they will be glad to invoke, and, unless they now set a great example of correct decision, may invoke in vain, those constitutional principles to which we now cry for safety.

Need I, Mr. President, urge the necessity of adhering to these principles, as it respects the independenc of the judiciary department? Need I enlarge on the essential importance of that independence, to the security of personal rights, and to the well being, nay to the existence, of a free government? No. These considerations strike the mind, of themselves, with a force not to be increased by any efforts of mine. It is sufficient merely to bring them into the view of this honorable court?

But it is not to the party accused, to the nation, to posterity, and to the interests of free governments, that the observance of settled constitutional principles, in cases of impeachment, is alone important. It is equally so to the character and the feelings of those appointed to judge. Is there any member of this honorable court, who would wish, nay who would consent, in deciding this cause to be, set free from the restraints of the law, or, more properly speaking, to be deprived of its guidance, and left to the influence of his own passions feelings or prepossessions? Were causes like this to be determined on views of expediency, and not on fixed principles of law, to what suspicions might not the judges be liable, of having fought the indulgence of some animosity, or the attainment of some selfish end, instead of consulting for the public good! But when they are known to be governed by the settled rules of law, and are considered as merely its organs, their motives will be more respected, and their conduct less liable to suspicion or reproach. Is any member of this honorable court prepared, to relinquish the high and venerable station of the organ and expounder of the law, in order to assume the doubtful and dangerous character, of a judge subject to no rule but his own arbitrary will?

To a judge, too, it is the greatest consolation, in the discharge of his painful duties, that when he has doomed a fellow-citizen to dishonor and misery, he ha-

merely pronounced the decision of the law, and not the dictates of his own will? That he is not the author of the sentence by which so much calamity is brought on others, but merely its official organ.—This reflection soothes his mind, under the anguish which it must feel from another's woe. And is there any member of this honorable court who would consent to relinquish this consolation? I boldly say no. I feel that every heart will respond to the assertion. And if any who hear me be capable of entertaining a contrary opinion, or would wish in the same situation to hold a different conduct, I envy not their feelings, however highly I may estimate their intellectual powers.

In every light, therefore, in which this great principle can be viewed, whether as a well established doctrine of the constitution; as the bulwark of personal safety and judicial independence; as a shield for the characters of those, whose lot it may be to sit on the trial of impeachments; or as a solace to them under the necessity of pronouncing a fellow citizen guilty; it equally claims, and I cannot doubt that it will receive, the sanction of this honorable court: by whose decision it will I trust be established, so as never hereafter to be brought into question, that an impeachment is not a mere enquiry, in the nature of an inquest of office, whether an officer be qualified for his place, or whether some reason of policy or expediency may not demand his removal; but a criminal prosecution, for supporting which the proof of some wilful violation of a known law of the land, is to be indispensibly required.

Before I proceed, Mr. President, to apply this principle to the case now under consideration, permit me to notice briefly another proposition advanced by the honorable managers, which I perfectly concur in, and shall take the liberty of using against them. They have laid it down, that the testimony of witnesses equally credible in themselves, is entitled to different degrees of credit, according the means which they respectively enjoyed, of correctly discerning the truth, in the matter about which they testify. To this proposition I fully assent. Let the principle be applied to the case now under consideration. Look at the witnesses on each side. With some few exceptions, perhaps, about which I do not feel it necessary to make any particular remark, they are equally credible in themselves, equally disposed to state the facts correctly. But who are the witnesses on the part of the prosecution? It must be answered, that almost all of them are persons, who have supposed themselves to be ill-treated by the respondent; whose resentment the lapse of four years has not been able to assuage; and who come here, under the manifest influence of these angry feelings, to complain of their imaginary wrongs. It is plain that such persons, however correct in their intentions, however desirous of speaking the truth, are liable to be misled by the irritation which these events excited in their minds; and to state as facts the recollection of their own erroneous impressions. It is perfectly manifest, that those gentlemen were very much irritated by the transactions of which they speak, and in which they were, or supposed themselves to be, parties. It is equally clear, that their anger has not yet cooled. And I will ask whether men in such circumstances, giving them the utmost credit for correct intentions, are equally entitled to belief, with persons who, like the witnesses on the part of the respondent, were calm and disinterested spectators of the events which they relate? Equally respectable with the witnesses for the prosecution; much more cool; free from that irritation which the parties in contention can hardly ever avoid; and testifying their impartiality by expressing without reserve, their disapprobation of some things in the respondent's conduct; it must be admitted that in every collision of testimony, they possess the highest title to belief.

Having taken this view of these preliminary points, I now proceed, Mr. President, to consider the various charges against our honorable client, in the order in which they have been placed by the prosecutors. It is not my design to go over the same ground, which has been so recently trodden by my able colleagues. The task assigned to me, is to range rapidly over the first six articles; to present some views on the subject, which the multiplicity of the matter induced

my learned colleagues to omit; and then to diſcuſs at large the law and the facts, under the ſeventh and eighth articles, which have not yet been touched.

On the caſe of John Fries, the ſubject of the firſt charge, permit me, Mr. Preſident, to avail myſelf of a diſtinction, laid down by the honorable manager who opened the caſe, on the part of the proſecution (Mr. Randolph). That honorable gentleman, in his opening addreſs, made a diſtinction between a general maxim or principle of law, ſuch as the definition of a crime; and a particular opinion on the law, as applicable to a particular caſe. The former he admits to be proper in a judge, at any ſtage of a trial—the latter he denies to be ſo. He has choſen the definition of one offence to illuſtrate his poſition. I will take that of another. Suppoſe a man to be indicted and put on his trial for burglary. The crime of burglary conſiſts in "breaking and entering a dwelling-houſe, in the night time, with intent to commit felony." This is the eſtabliſhed definition of this offence. According to the diſtination of the honorable gentleman, the judge might at the commencement of the trial, or at any ſtage of it, declare this general principle reſpecting the nature of the offence, even before counſel were heard. Nay more, he would be juſtified in preventing counſel from attempting, before the jury, to controvert this principle. This latter point is not expreſsly admitted by the honorable gentleman; but it flows from his admiſſion, as a neceſſary conſequence. So far the judge might ſafely go; but ſhould he advance a ſtep further, and declare, before counſel had been heard, that the acts done by the perſon on trial did amount to burglary, then he would be culpable, and even criminal: and this, the honorable gentleman contends, was done by the reſpondent in the caſe of Fries.

I conſent to be judged by the rule which the honorable gentleman has himſelf eſtabliſhed; and I undertake to ſhew, that nothing more was done by the reſpondent, in the caſe of Fries, than the honorable gentleman admits may be properly done by a judge; that he merely ſtated the general definition of the crime of treaſon, by levying war againſt the United States; but expreſſed no opinion whether the priſoner was guilty or innocent, whether the acts which he had done amounted to treaſon. For the correctneſs of this poſition I appeal to the opinion itſelf, as in evidence before the court. It is contained in Exhibit, No. 2, filed with the anſwer.

In this paper the court, after ſome preliminary obſervations, to ſhew that the queſtion relative to the conſtitutional definition of treaſon, were queſtions of law and not of fact, proceed to ſtate as their opinion, "that any inſurrection or riſing of any body of people, within the United States, to effect by *force* or *violence* any object of a great public nature, or of public and general (or national) concern, is a levying of war againſt the United States, within the contemplation and conſtruction of the conſtitution of the United States." "That on this general poſition, any *ſuch* inſurrection or riſing, to reſiſt or prevent by force or violence, the execution of any ſtatute of the United States, for collecting taxes, duties, impoſts or exciſes, or for any other purpoſe, (under any pretence, as that the ſtatute was unjuſt, burdenſome, oppreſſive or unconſtitutional,) is a levying war againſt the United States, within the conſtitution."—"That military weapons, as guns and ſwords, mentioned in the indictment, are not neceſſary to make ſuch inſurrection or riſing amount to levying war; becauſe numbers may ſupply the want of military weapons, and other inſtruments may effect the intended miſchief."—"That the legal guilt of levying war, may be incurred without the uſe of military weapons or military array."—"That the aſſembling bodies of men, armed and arrayed in a warlike manner, for purpoſes only of a *private* nature, is not treaſon; although the judges or peace officers ſhould be inſulted or reſiſted, or even great outrage committed on the perſon and property of our citizens."—"That the true cri-

terion to determine whether *acts committed* are treason, or a less offence, (as a riot) is the *quo animo* the people did assemble." — "That if a body of people conspire and meditate an insurrection, to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the quantum of the force employed, neither lessens or increases the crime." — "That a combination or conspiracy to levy war against the United States, is not treason, unless combined with an attempt to carry such combination or conspiracy into execution." — And that "some actual force or violence must be used, in pursuance of such design to levy war; but it is perfectly immaterial whether the force used is sufficient to effectuate the object."

This, no doubt, is a long definition Perhaps it might have been expressed in much fewer words. But still it is a general definition of the crime of treason by levying war; without application or reference to any particular case, much less to the case of John Fries. It amounts merely to this: "That for any number of people, however small and inadequate, to rise with intent to resist or prevent by force, the execution of any general law of the United States, and to employ actual force for that purpose, amounts to levying war against the United States, although neither military weapons nor military array be used." This is the substance of the opinion. All the rest is merely illustration; and in this shape it is as much a general definition, as that of burglary.

How wide a field of defence do these definitions leave open! In the case of an indictment for burglary, would any counsel peevishly or insolently retire from the prisoner's defence, because the court might in the commencement of the trial, have stated this to be the legal definition of the crime? Would he insist on the absurd and mischievous privilege, of controverting so plain and well settled a principle of law? No. Far different would be his conduct. He would enquire whether any acts had been done, amounting in law to the breaking open of a house? Whether the prisoner was the perpetrator of those acts, or a party in them? Whether the house was broken open in the night time? Whether it was entered by the prisoner as well as broken? Whether it was a dwelling house? And whether it was broken and entered with intent, to commit any crime amounting to felony? All these questions would be perfectly open, under the general definition which has been stated; and on the result of these enquiries, would the guilt or innocence of the prisoner depend.

So in the case of Fries, it was perfectly competent to his learned counsel, under the general definition of treason given by the court, to contend that the acts proved, did not amount to a rising of any number of people; that John Fries was not implicated in those acts; that they were not done with intent to resist or prevent, by force or violence, the execution of any general law of the United States; or that no force or violence was actually employed, in pursuance of such intention.— All these questions were perfectly open to them, notwithstanding the general definition of treason given by the court. Not one of these questions did the court in any manner decide. These questions involve the application of the general definition to the particular case; an application the which the true proper and only defence of the prisoner consisted, and which the court neither made nor intended to make.

Surely these questions afforded full scope to the learned gentlemen, for the exertion of those argumentative powers, and the display of that legal learning, of which they have given, in the shape of testimony, so handsome a specimen at this bar. Even that eager fondness for legal disputation, which has carried them, on this occasion so far beyond the limits prescribed by the law of evidence, might have been gratified in this ample field. There was room enough for the learned and ingenious distinctions, which one of the gentlemen (Mr. Dallas) has told us that he intended to make, between the case of Fries and that of the western insurgents. It was his intention, he says, had he not been prevented by this unfortunate definition, to dwell on several circumstances which, in his apprehension, distinguished the former of these cases from the latter

He tells us that his mind turned itself towards these distinctions, and was occupied upon them, from the moment when the court granted a new trial, after the first conviction of Fries. His mind was led into this course of reflection, by the stress which he had observed the court to lay, in the first trial of Fries, on the decisions in the cases of the western insurgents. It would surely have been very unkind in the respondent, to prevent the learned gentleman from exhibiting the results, of these long and profound reflections. But happily the respondent did not prevent him. His disappointment must be attributed solely to himself. The circumstances on which he informs us that he intended to rely, for distinguishing the case of Fries from those of the western insurgents, were the martial array at Braddock's field; the march to Pittsburg, for the avowed purpose of attacking the garrison; and, I think, the attack on Nevill's house.—The first of these circumstances applied to the nature of the assemblage, whether it amounted to a rising or insurrection; the second to the intent with which the rising was made; and the third to the degree and nature of the force or violence committed. They were all open to the learned gentleman under the opinion: which did not declare what sort of an assemblage would constitute an insurrection or rising; what circumstances would be sufficient evidence of the improper intent, or what kind or degree of force or violence must be employed; but merely stated that a rising or insurrection, proceeding from such an intent, and accompanied by actual force or violence, would amount to levying war. Whether the assemblage in Bucks and Northampton, had the necessary ingredients, to constitute a rising or insurrection; whether the acts done afforded sufficient evidence, of an intent to resist or prevent by force or violence, the execution of the act of Congress; whether the force or violence committed were sufficient in nature or degree; and whether in all or any of these points of view, the case of Fries in Bucks and Northampton, was weaker than that of the western insurgents, or materially different from it; were questions not at all affected by the opinion, but left entirely open to the learned gentleman; who might, notwithstanding this opinion, have discussed them before the court and jury, at all the length into which the exuberance of his genius so much delights to shoot.

These learned gentlemen possessed, therefore, under the opinion communicated to them by the respondent, even if it had not been withdrawn, all the latitude which moderate counsel could have desired. All the questions of fact; all the questions of intention, which are questions of fact; the whole business of deciding, whether the case proved came within the general principle of law; of applying the general rule to the particular case; remained within the province of the jury, and furnished the only proper means of defence. Even if the facts had been admitted, as the honorable managers contend, still the intent remained to be ascertained, and was a question of fact, solely cognizable by the jury. —But it is utterly incorrect to say, that the facts were admitted. It was, indeed, admitted, or rather it was not doubted, that certain acts had been done, by John Fries and others: but whether those acts were of such a nature, and proceeded from such an intention, as to bring the case within the general rule of law, laid down by the court, was a point unsettled, which formed the proper and sole ground of enquiry. And this point was not affected, by the opinion communicated by the respondent to the prisoner's counsel.

And here, Mr. President, let me be permitted to notice, what I deem a most dangerous error, respecting the constitutional power of juries, in criminal cases. It is constantly asserted, that the jury are to decide the law and the fact, in criminal cases; and this is correct when properly explained: but taken in its literal unqualified sense, it is contrary to every principle of law, and every dictate of common sense. It is the province of the court to expound and declare the law generally, in all cases, criminal as well as civil. To apply the law to each particular case, to decide whether the facts proved in any case, bring it within the general rule of law, is the province of the jury, and their only province. They have no dispensing power over the laws of the land. Will any man, the least acquainted with our system of jurisprudence, declare, that a jury has a right to decide, that breaking open and entering a dwelling house in the night

time, with intent to fteal, is not burgulary, unleſs an actual theft be committed? I preſume that no one will hazzard ſuch an opinion. The jury, in ſuch a caſe, may decide that the houſe was not broken open, and entered; that it was not a dwelling houſe; that the fact was not committed by the perſon accuſed; that it was not committed in the night time; or that it was not committed with an intent to commit a felony. But if they believe the affirmative, on all thoſe points, they muſt find the priſoner guilty, or commit a direct violation of their oaths. They are bound by the general principle of law, as declared by the court. Their duty, and their ſole duty, conſiſts in applying it to the particular caſe. In this ſenſe, and this alone, are they judges of the law as well as fact.

It is well known that a new trial may be granted in a criminal caſe, where the verdict is againſt the party accuſed, and is ſuppoſed by the court to be contrary to law. This proves that the jury are not the judges of the law, in the unqualified ſenſe contended for by ſome perſons: for if they were the judges of the law in that ſenſe, it would neceſſarily follow, that a new trial could no more be granted in favor of the priſoner, in a criminal caſe, then againſt him. The rule that it cannot be granted againſt him, has been eſtabliſhed by the court in favor of life, through a laudable motive of tenderneſs and humanity; and not becauſe they had not power to grant new trials in this caſe, as well as in others, where a verdict is contrary to law.

So in caſe of an offence created by ſtatute, a jury may declare that the caſe proved on an indictment under the ſtatute, does not come within it; for want of the improper intent, or of ſome other neceſſary ingredient. But it has never entered into the head of any man to ſuppoſe, that the jury, in ſuch a caſe, has a right to declare, that the ſtatute itſelf is not a law of the land, has been repealed, has expired, or does not create any offence. All theſe are queſtions of law, which come within the excluſive province of the court.

This conſideration, by the way, furniſhes the true anſwer to the famous Richmond ſyllogiſm, of which we have heard ſo much in this caſe; and proves the correctneſs of that deciſion, by which the counſel of Callender were prevented, moſt properly, from conteſting, before the jury, the conſtitutionallity of an act of congreſs —a deciſion which the honorable managers have had the good ſenſe not to call in queſtion. This deciſion, undeniably correct as it is, and ſtrange as the abſurdities are to which a contrary principle would lead, can be defended on no other ground, than that for which I contend.

And I will aſk how the caſe of treaſon can be diſtinguiſhed in this reſpect, from that of burgulary? If a jury be bound by the general rule of law, which defines the crime of burgulary; and be confined ſolely to the enquiry, whether the caſe proved comes within that rule; upon what principle can it be contended, that they are not equally bound by the general definition of treaſon?

Will it be contended that the latter definition is not as well ſettled as the former? This poſition I deny. How was the definition of burglary ſettled? It was not by any legiſlative act, remaining on record, or known by tradition; but by judicial determinations declaratory of the law. In the ſame manner has the definition of treaſon by levying war been ſettled. Three ſolemn adjudications in the ſame court, and one of them in the ſame caſe, had declared it to be the law; and it was the law of the land, as much as the law defining burglary, or any other offence. If gentlemen deny that three ſolemn deciſions upon the ſame point, by a court of the higheſt juriſdiction, are ſufficient to ſettle the law; will they inform us how many deciſions are neceſſary for that purpoſe? Or are we never to have fixed principles, or ſettled definitions of crimes? Is the law of treaſon never to be eſtabliſhed on a certain baſis? Are the nature and definition of this high offence, to be left forever floating, on the uncertain and varying opinions of courts and of juries? Is that which was not treaſon today, to become treaſon to-morrow, according to the caprice the intereſts or the prejudices of thoſe, who may be appointed to determine, or to the power influence or intrigues of the accuſer or the accuſed? If ſucceeding courts and juries are not to be bound, by precedents eſtabliſhed by their

predeceſſors, then will every thing be treaſon when a man is tried by his foes, and nothing when he is tried by his friends. There will no longer be any ſecurity, in times of party contention, for life liberty or property; and we are deſtined to ſee acted over in this land, vainly boaſting of its freedom and happineſs, the ſcenes of judicial murder and pillage, which diſgraced our mother country, during the ſtruggles between the houſes of York and Lancaſter. Sooner than live under ſuch a ſyſtem, I would take refuge in Turkey; where by bribing the Cadi, I might eſcape from judicial tyranny; and might be ſafe from the oppreſſion of the government, provided I avoided the offence of growing rich. Not for one moment would I live in a country, where I ſhould be tantalized with the ſemblance of liberty, and in fact liable to the penalties of treaſon, whenever I might by any act of oppoſition, or any aſſertion of my rights or thoſe of my fellow-citizens, become obnoxious to a party in power. This muſt be the conſequence, ſhould the principles contended for by the managers finally prevail. When the rules of law defining offences are fixed and certain, then is every man ſafe; becauſe he may know the law, and may avoid offending againſt it. But if no reſpect is to be paid to former deciſions; if counſel are to be allowed to controvert points, which have been ſolemnly and repeatedly adjudged; if our courts and jurors, without regard to former deciſions, are to declare that to be law in each particular caſe, which the paſſions the prejudices or the political views of the moment may dictate; then indeed have we graſped a ſhadow, while the ſubſtance has eſcaped from us, and the blood of our fathers has in vain bedewed their native ſoil. But no. So monſtrous a principle cannot be endured, and will not receive the ſanction of this honorable court. Rules of law once eſtabliſhed muſt be adhered to. Courts muſt regard them as ſacred, and muſt not allow them to be called in queſtion. In this caſe the opinion communicated had been ſolemnly ſettled, and was a part and a moſt important part of the law of the land. There was no ſuperior tribunal to review it; and if there be one the argument is ſtill ſtronger: for then the acquieſence of the parties, who took no meaſures to get theſe deciſions reverſed, is added to the authority of the court which made them. The court, therefore, where the reſpondent preſided, was bound to conſider theſe deciſions as the law of the land, to declare them as ſuch, and to prevent them from being called into queſtion, for the purpoſe of miſleading the jury.

Another charge waged againſt our honorable client, under the firſt article of impeachment, is that he prevented the priſoner's counſel, in the caſe of Fries, from citing to the jury certain Engliſh adjudications on the law of treaſon, and ſome ſtatutes of the United States. So far as this charge relates to the ſtatutes, I ſhall leave it moſt chearfully where it has been placed, by my learned and ingenious colleague who commenced the defence. Nothing can be added to the ſtriking and ſatisfactory view, which he has given of that point. As to the Engliſh authorities, I will make one obſervation, which did not fall within the ſcope of his argument.

The reſpondent did ſay that Engliſh adjudications, at common law, on the doctrine of treaſon, ought not to be read to the jury; that Engliſh deciſions before the revolution of 1688, under the ſtatute of treaſons, were deſerving of very little attention; and ought to be received with great caution; and that ſuch deciſions ſince that revolution, though proper to be cited, were not to be conſidered as abſolute authorities, but merely as ſtrong arguments. Into the legal correctneſs of this opinion, it is not now my purpoſe to enquire. The point has been ſufficiently diſcuſſed. But I beg this honorable court to remark, that this opinion, of which the learned counſel for Fries now ſo loudly complain, was an opinion preciſely in their favor, and gave them all the advantage on this ſubject, that they expected to derive from citing theſe Engliſh caſes.—Why did they wiſh to cite theſe caſes?—It was, they tell us, to convince the jury of the very thing which the court thus declared to them; namely, that the Engliſh deciſions before the revolution of 1688, were entitled to little or no attention; and that even thoſe ſince the revolution, being in ſome degree founded on the former, ought to be received with caution, and not to be conſidered in the light of abſolute and binding authorities. Theſe were the points which they wiſhed to eſtabliſh, by citing

thoſe Engliſh adjudications: And theſe were preciſely the points which the court eſtabliſhed. The deciſion was completely in their favor; and yet they complain of it, as a grievous injury. They complain of it, though in their favor, becauſe it was made without giving them an opportunity of ſpeaking. Whence this cauſeleſs diſcontent, this moſt unreaſonable complaint? Did it proceed from the diſappointment of a puerile and little vanity, which made them wiſh to exhibit their talents before the public? Surely we cannot ſuſpect thoſe learned gentlemen of ſo contemptible a motive.—Why then, I repeat, do they complain of a deciſion made in their favor? They have been compelled by the force of truth, to explain the reaſon. The truth is, as it appears on their own teſtimony, that they complained, not becauſe they thought themſelves or their client injured by this deciſion, but becauſe it ſuited their purpoſe to repreſent themſelves as injured, their client as oppreſſed, the caſe as prejudged, and the conduct of the court as arbitrary and precipitate; in order to excite odium and reſentment againſt the court, and commiſeration towards their client; and to induce the Preſident, by erroneous impreſſions thus made on his mind, to extend his mercy to a perſon, who could not have been thought a fit object for it, had the truth been known. The whole of this pretended diſpleaſure; all this affected outcry about the privileges of counſel, the rights of jurors, and pre-judged opinions; was a mere pretence, an artful contrivance, to procure the pardon of a criminal twice convicted of treaſon: and to procure it, by holding up a falſhood to the view of the Preſident, and of the public; by calumniating the court, deceiving the executive, weakening the confidence of the people in the adminiſtration of the laws, and ſacrificing truth and juſtice to the attainment of a momentary purpoſe.

The learned gentlemen thought themſelves juſtified in all this, by their duty to their client. It is not for me to condemn them. I am not here to examine into the impropriety of their conduct. But I may be permitted to aſk, whether ſuch a contrivance ought to receive the countenance of this high court? And whether gentlemen who have thought it right thus to act, ought not to be liſtened to with caution, when they come here after their ſiniſter has completely ſucceeded, to complain of injuries, which in the ſame breath they tell us are entirely fictitious? I will aſk, whether this honorable court ought not to diſcountenance ſuch proceedings in future, by vindicating the conduct of the reſpondent, in this particular? Counſel, Mr. Preſident, have duties to themſelves and to the public, as well as to their clients. They are at all times bound to reſpect the courts of juſtice, and themſelves. They owe to their clients every honorable exertion of their talents and induſtry, and the zealous uſe of every fair means of defence. In criminal caſes, eſpecially when life is in jeopardy, we expect more zeal, and are willing to allow more latitude.——In favor of this zeal, we are diſpoſed to excuſe ſome departure from the ſtrict line, which propriety would in other caſes preſcribe. But: to be countenanced, upheld and commended, for attempting to excite odium unjuſtly againſt a court; and to induce the Preſident, to believe that a priſoner was deprived by the court of a fair trial, when they knew the fact to be directly otherwiſe; is more than modeſt man would aſk, or any man has a right to expect.

But let it be admitted for a moment, Mr. Preſident, that on the firſt day of the trial of Fries, the reſpondent committed an error. I aſk if it was not atoned for, by his full and honorable retraction on the ſecond? By the pains which he took to do away all the proceedings of the firſt day; to induce the priſoner's counſel to go on with the defence; and to ſecure to him, in the utmoſt latitude, every advantage for making that defence? One of the honorable managers has told us, that the reſpondent's conduct on the firſt day, was an unpardonable ſin: That repentance, if it came at all, came too late. But this, ſir, is not the rule by which we hope one day to be judged. We live in the comforting hope, that repentance, if ſincere, can never come too late. We hope that by a ſhort, a death-bed repentance, we may obtain pardon for a life of errors and ſins.—Our holy religion permits us to believe, that there is but one unpardonable ſin; and that is hardneſs of heart, or refuſal to repent. And ſhall we frail and ſinful mortals, mete to each other a meaſure, which

an all-juſt and all-powerful God does not mete to us? Shall we refuſe to each other the effects of that repentance, by which alone we can ourſelves hope for happineſs hereafter? If for one error thus atoned for, the reſpondent muſt be puniſhed, let the firſt ſtone be caſt by him, who has always retracted and corrected his errors, as ſoon as he was made ſenſible that they had been committed.

I do not, Mr. Preſident, with my learned colleague who commenced the defence, diſclaim the term "repentance" for my honorable client. Repentance is a term which ſuits creatures ſo frail and liable to error as men, even the beſt of men. We all have need of it, and I truſt that we ſhall be aſhamed of our errors, but not of our repentance. I have often had occaſion to repent myſelf. I fear that I have not done it often enough. And however ſlight the errors which the reſpondent may have committed, I am willing in his behalf, to rely on the plea of repentance and amendment.

But this amendment we are told by the honorable managers, was a mere pretence; a cloak beneath which the reſpondent fought to hide the ſuppoſed deformity of his conduct, when he found that it began to attract attention. But, I aſk, was it a pretence to entreat to ſupplicate the priſoner's counſel to proceed with the defence, till the cup of humiliation was drained to the dregs? Was it a cloak to be anxiouſly ſolicitous, after the priſoner was abandoned by his counſel, to protect him from the dangers into which his ignorance of the law might betray him; to urge his acceptance of other counſel; to inform him carefully of his right of challenge; to aſſiſt him in croſs-examining the witneſſes, ſuggeſting ſuch queſtions as might be to his advantage, and guarding him againſt ſuch as might draw forth unfavorable anſwers; to prevent the witneſſes in the ſubmitted caſes, from being examined before his trial, leaſt the jury might hear teſtimony unfavorable to him, which he could have no opportunity or croſs-examining? Was this the conduct of a deſigning hypocrite, ſeeking to gloſs over his wicked purpoſes, by a fair outſide of humanity and juſtice? Of an artful and worthleſs oppreſſor, thirſting for the blood of an innocent victim? If this be oppreſſion, God grant that I and mine may never be otherwiſe oppreſſed!

I come now, Mr. Preſident, to the caſe of Callender. But before I enter into thoſe views which remain to be taken, of the charges ariſing out of that caſe, let me be indulged in ſome preliminary remarks, on that part of the evidence adduced in their ſupport, which was ſuppoſed by the honorable managers, to furniſh direct proof of corrupt intentions, on the part of the reſpondent.

This evidence was given by Mr. Maſon, Mr. Triplet, and Mr. John Heath.—As to the firſt gentleman, his teſtimony relates to a private and jocular converſation, no part of which he recollects perfectly; and the moſt material part of which, the part that furniſhes the true explanation of the whole affair, he has entirely forgotten. It cannot be doubted that this honorable gentleman, was dragged with extreme reluctance to detail at the bar of a court of juſtice, a private and of courſe a confidential converſation, the moſt material parts of which a lapſe of five years has effaced from his memory. It muſt have been to him a moſt painful neceſſity, a moſt cruel violence, which obliged him to do an act that, if done voluntarily, would have amounted to a violation of that confidence, which in the intercourſe of ſociety men of honor place in each other. Ought a ſpecies of examination to be countenanced, which muſt place honorable men in ſo painful a ſituation, and ſubject them to ſo cruel a neceſſity? Which muſt compel them, after having been conſidered as companions, and perhaps as friends, to aſſume the odious character of ſpies, and to fulfil the deteſtable functions of informers? Which muſt deſtroy all the confidence, and of courſe all the pleaſure, of ſocial intercourſe, that great ſweetener of the ills of life; muſt ſpread the gloom of miſtruſt over all our moments of hilarity & relaxation; and muſt convert our breakfaſt tables, our parlors and even our little friendly ſuppers, where the boſom is wont to expand, and the heart is laid on the table, into ſcenes of watchful jealouſy, of dark and cautious ſilence!—Ought a practice to be tolerated, which thus ſtrikes at the root of ſocial harmony, private honor, and public morality?

How dangerous too is this ſpecies of teſtimony to the intereſts of truth, and the ſafety of innocence! In this very caſe the honorable witneſs, with all his accuracy of

recollection, and all his desire to represent the transaction, in a light as favorable to the party accused as the truth would permit, has forgotten the most material part of the conversation: That part in which he himself was immediately concerned, which drew forth the rest, and which furnishes the true explanation of the respondent's meaning. The part which he has thus forgotten, has been happily supplied by another witness, judge Winchester, who was also present at the conversation. But what might have been the situation of the respondent, had judge Winchester's memory been equally frail, or had he died before this trial? That most satisfactory explanation which he has given, and which has removed every shadow of doubt from this part of the case, would then have been wanting; and the respondent might have been convicted on a recollection which would in that case have appeared complete, though we now know it to be utterly imperfect.

This explanation proves the whole conversation to have been a mere jest, and a jest provoked and drawn out by Mr. Mason himself. Without the explanation, it might have borne an improper, though not a criminal aspect. With the explanation it amounts to nothing more than an expression of the respondent's intention, made in jest, by way of reply to a jest of Mr. Mason, to have the affair of the "Prospect Before Us" investigated when he should arrive at Richmond, and to bring the author and publisher to punishment.—— Will it be said that in this there is any thing criminal, or even improper? Is it not the duty of a judge, presiding in a court of criminal jurisdiction, to cause enquiry to be made into offences which he knows to have been committed, and to take steps for bringing the offenders to justice? Suppose that instead of a libel, a piracy had been committed; and that the respondent, being informed that the pirates were lurking within the district of Virginia, had declared that he would have them brought to trial if they could be caught, and punished if guilty—would this have been improper? And does the difference between offences make any difference in the duties of a judge? Is he not equally bound to execute all the laws? If gentlemen say no, will they be pleased to draw for us the proper line of discrimination, between those laws which a judge must execute, and those which he ought to neglect? Or is this line to be drawn by his own caprice? Was not the sedition act a law of the land, and was not the "Prospect Before Us" a violation of that act? If there were any circumstances which rendered it proper to dispense with the penalties of this law, or to pardon the offences committed against it, there was a power in the constitution to do so; but that power resided in the executive department, and not in the judicial; whose duty it was to execute all the laws, without respect to circumstances persons or cases.

As to the testimony of Mr. Triplett, I cannot conceive what proof it can furnish of criminal intention. It amounts to this, and nothing more, that the respondent, in the course of some very loose and thoughtless conversation, from which it would have been much more prudent to abstain, applied some harsh epithets to the "Prospect Before Us," and its reputed author; and expressed an apprehension that he would escape punishment. But does it follow, that because a judge remarkable for hasty and strong expressions, has applied some harsh and angry epithets, to a person believed to be an atrocious offender, he will not do him justice when he comes on trial? It must also be remarked, that Mr. Triplet is manifestly in a mistake, respecting the last conversation which he has attempted to detail. He represents the respondent as saying, that the marshal had returned without Callender. But we know that the marshal did not return without Callender. This mistake on the part of Mr. Triplett may induce us to doubt, whether with the strongest desire to represent nothing but the truth, which I have no doubt that he felt, he may not have viewed the other circumstances also in too strong a light. We well know that facts of this nature derive their complexion, almost entirely, from small circumstances of time manner and connection; and when we find so candid a witness mistaken in so material a circumstance, we may fairly conclude that he has omited on one hand, or too much heightened on the other, some of those finer shades, on which the character of the piece always depends.

With respect to the fact related by John

Heath. I have no difficulty in admitting that if true, it fixes the ſtain of corruption on the character and conduct of the reſpondent, and ought to produce his conviction. Jurors in every caſe, and eſpecially in criminal caſes, ought to be ſelected without reſpect to any circumſtance, but their impartiality and legal qualifications. Of all criterions, that of political opinion or party counection is the moſt improper to govern, and ought the moſt carefully to be avoided. For a judge to interfere with the marſhal, and direct him to ſtrike off from a jury liſt, in a criminal caſe, all thoſe perſons who were ſuppoſed to agree in political opinion with the party accuſed; or, in other words, to combine with the marſhal in packing a jury, for the purpoſe of enſuring the conviction of the party accuſed; would be an offence for which he ought to be puniſhed. But this teſtimony of John Heath is deeply ſhaken by one witneſs, and flatly contradicted by another. I will not enquire into the character of John Heath; which I have no means of knowing or of making known: But I will ſay that it cannot ſtand on higher ground, than that of David Mead Randolph, who has flatly contradicted Heath; or of William Marſhall, who has gone as near to a poſitive contradiction, as it is poſſible to go without making one. There muſt be a miſtake ſomewhere. But we cannot believe the fact ſtated by John Heath, without believing that David Mead Randolph has been guilty of a direct & wilful perjury, and that William Marſhall has gone as near to it as poſſible. Thoſe gentlemen are known to all Virginia. The evidences of their character are to be found, in the breaſts of every man in that ſtate. But as to Mr. Randolph, there is direct evivence in this cauſe to ſupport his veracity. Mr. Hay has declared at this bar, that he did not recollect having uſed certain expreſſions, which were attributed to him, but had no doubt that he had uſed them, after Mr. Randolph ſaid ſo. Such was his reliance on Mr. Randolph's veracity and recollection! It is not poſſible to have ſtronger teſtimony in favor of a witneſs. If ſtronger could exiſt, it would be found in another circumſtance which has appeared in evidence. When one juror whom he had ſummoned for the trial of Callender, told him that he had made up his mind to convict the traverſer, and urged that circumſtance as an excuſe, the excuſe was admitted by Mr. Randolph, and the juror was diſcharged. But when colonel Harvie applied through the chief juſtice, to be excuſed in a ſimilar ſituation; and alledged as a reaſon that he was pre-determined to acquit Callender, let the evidence againſt him be what it might, becauſe he believed the ſedition law under which he was indicted to be unconſtitutional, Mr. Randolph would not excuſe him. This fact appears by the teſtimony of the chief-juſtice. Can it be for a moment believed, that a marſhal acting in this manner, would enter into a corrupt and profligate combination with a judge, to pack a jury for the conviction of Callender; and would come to this bar and complete his turpitude, by a direct & wilful perjury? His conduct in office; the univerſal reſpect which he enjoys in his own country, among men of all parties and opinions; his manner of giving teſtimony at this bar; and the evidence which his political enemies have here borne in his favor, all preclude the idea.

This witneſs, ſo honorably ſupported by the principal witneſs on the part of the proſecution, ſo high in his character, ſo ſcrupulouſly delicate in his conduct, ſo ready to diſcharge a juror who had made up his mind to convict the traverſer, while he refuſed to diſcharge one who was pre-determined to acquit him, is ſaid by John Heath to have preſented the pannel of jurors to the reſpondent, who told him that if he had any "of thoſe creatures called democrats" on it, they muſt be immediately ſtruck off. He poſitively declares that no ſuch converſation, as that ſtated by Heath, ever took place; that the reſpondent never ſaw the pannel; and that it was not compleated till after the meeting of the court, when the reſpondent was on the bench, and, therefore, could not have been ſhewn to him.

In this poſitive contradiction of Heath, he is ſtrongly ſupported by William Marſhal; the irreſiſtable effect of whoſe teſtimony, derived from the peculiar candor ſolemnity and preciſion with which it was delivered, as well as from his high character, all who heard it have felt and acknowledged.

Heath has declared, that the incident which he relates, took place at the lodginge

of the judge ; that he was there but once, which was in the morning, a little before the time when the court uſually met ; that he remained about half an hour ; and that no perſon was preſent, except the judge the marſhal and himſelf.

William Marſhal declares, that in the morning he called on the judge, according to his cuſtom, a little before the meeting of the court ; that when he entered the room, Heath had left it, or was in the act of leaving it, and immediately went away ; and that the judge did not ſay one word in his hearing, which it was poſſible for Heath to hear. Thus far he ſpeaks poſitively. He adds that he firmly believes, but cannot poſitively aſſert, that the marſhal, David Mead Randolph, went with him to the judge's lodgings, and left them with him ; and that they both together attended the judge to the court-houſe. His reaſons for this belief are, that he has a ſtrong impreſſion of the facts on his mind, though not a perfect recollection ; that it was his daily cuſtom to call on the judge in the morning, on his way to the court-houſe ; that in going from his own houſe to the lodgings of the judge, he paſſed by or near the office of the marſhal, who uſually accompanied him, in order to attend the judge to court ; and that he perfectly recollects a converſation between himſelf and the marſhal, on the way from the judge's lodgings to the court-houſe, in which he remarked to the marſhal, the circumſtance of having ſeen Heath with the judge. This converſation with Mr. Randolph, Mr. Marſhal perfectly recollects, and that it took place on the way from the judge's lodgings to the court-houſe ; and he very naturally infers from it, that they left the judge's lodgings at the ſame time : As the other circumſtances which he has ſtated, induced him to believe, with equal probability, that they went there together.

If they went together, then is Mr. Marſhall alſo in poſitive contradiction with Mr. Heath. The only way in which they can be reconciled, is to ſuppoſe that Mr. Randolph went there without Mr. Marſhall, and had before that gentleman's arrival, the converſation which is related by Mr. Heath. It could not have been afterwards ; for Heath went away as Marſhall entered, and did not return. He has ſaid that he was there but once ; and that when he left the judge, he went immediately on the Hill, and related the converſation. That Randolph and Marſhall went together, is in the higheſt degree probable, not only from Marſhall's belief of the fact, and the ſtrong impreſſion of it remaining on his mind ; but alſo from the circumſtances which he has ſtated. If they went together, then it is clear, if Marſhall tells the truth, that Heath left the room as they entered it ; that no converſation could have taken place between Randolph and the judge, in the hearing of Heath, without being heard by Marſhall alſo ; and that none in fact did take place. Conſequently it is manifeſt, that unleſs we believe, contrary to all probability, and to the belief and ſtrong impreſſions of Marſhall himſelf, that Randolph went to the judge's lodgings before him, we muſt admit that his teſtimony, as well as that of Randolph, is in direct contradiction with the teſtimony of Heath.

To this double contradiction we muſt add, the extreme improbability of the fact itſelf. A judge having a deſign to pack a jury, for the purpoſe of procuring the conviction of a perſon, whoſe ſuppoſed offence was intimately connected with the political ſtruggle, in which the country was then ſo warmly engaged ; about to execute, this deſign at the place where the proſecution had excited the greateſt irritation ; ſurrounded on all ſides, and watched at every moment, by thoſe whom he knew to have moſt zealouſly eſpouſed the cauſe of the ſuppoſed offender ; and entering into a corrupt combination with the marſhal, for the purpoſe of carrying this criminal deſign into effect ; a judge in theſe circumſtances and with theſe views, developes his plans to a perfect ſtranger ; whom, if he had known any thing of him, he muſt have known to be perfectly devoted, to the political friends and ſupporters of the perſon accuſed ! ! Sir, the thing is impoſſible. The judge muſt have been a fool, as well as a knave, to act in this manner. Conſpiracy, ſir, ſeeks darkneſs, and not light. Its plots are formed in ſecret corners. Its communications are wrapt up in cyphers, or conveyed in cautious whiſpers. Had the reſpondent intended to hold ſuch a converſation with the marſhal, he would have waited till Heath was gone, would then have drawn his accomplice into

one of thofe dark hiding places which conſpirators love, and there would have muttered his corrupt orders. If the words which Heath relates had been ſpoken, the ſingle circumſtance that they were ſpoken openly in his preſence, would be ſufficient to prove that they were nothing more than a fooliſh jeſt, devoid alike of criminal intent and ſerious meaning.

It is indeed poſſible, that Heath may have heard the reſpondent utter ſome inconſiderate jeſt, about democrats on the jury, which his zeal led him to miſtake, for a direction to the marſhal to ſtrike them off. I am deſirous of ſuppoſing that ſomething of this ſort may have happened: for I can ſee no other way of relieving this man, from the imputation of wilful falſe ſwearing; which it would be moſt painful to ſee fixed on any perſon, and eſpecially on one who has filled an honorable ſtation, under the government of his country.

Before I quit the ſubject of Heath's teſtimony, let me be permitted, Mr. Preſident, to aſk why, if it was believed, it was not taken a year ago, when witneſſes were convened from all parts of the continent, and the teſtimony was collected on which theſe articles of impeachment were founded? It muſt have been well known at that time; for he has declared that he mentioned the fact to Hugh Holmes, Merewether Jones, and ſome others, as ſoon as it happened; and to a great many perſons afterwards. Had this teſtimony then been taken, and preſented to the public with the reſt of the evidence, we might have been prepared to contradict or explain it. I will aſk, why the honorable managers have not ſummoned ſome of thoſe perſons, to whom this ſtory was related by Heath, and who might have corroborated or refuted his teſtimony? Thoſe perſons were fully within their reach. Nay the minutes of this court ſhew, that Mr. Hugh Holmes has actually been ſummoned: and, if I am rightly informed, he has attended for three days paſt. Why is he not produced? I will not undertake to account for this omiſſion; but I will ſay, that if Heath's teſtimony was believed, it ought to have been taken at firſt, ſo as to give us an opportunity of inveſtigating it fully; and that it appears probable, that the managers would have adduced the witneſſes who were certainly in their reach, to corroborate Heath, did they not apprehend a contradiction inſtead of a corroboration.

So much for the proofs adduced, of a previous corrupt intention in the reſpondent, to procure the conviction of Callender. Weak as they are in themſelves, and broken by the oppoſing teſtimony, let us complete their overthrow, by bringing againſt them the proofs which the evidence exhibits, of a diſpoſition full of juſtice and humanity. It is written that "by their fruits ye ſhall know them." Let us then look to the fruits. Let us examine the conduct of the reſpondent towards Callender, throughout the trial; and enquire whether it bears the marks of a diſpoſition to oppreſs.

And, firſt, let us oppoſe converſation to converſation: the converſation with William Marſhall about the jury, to thoſe with Mr. Maſon and Mr. Triplett. William Marſhall has informed us that the judge, having heard the name of Mr. Giles mentioned in court, enquired if that was the celebrated Mr. Giles, member of Congreſs; that he afterwards aſked the witneſs, whether it was probable that Mr. Giles would remain in Richmond, till the trial of Callender; and afterwards added, that he ſhould wiſh Mr. Giles to be on that jury; and indeed, if it were proper for him to give any intimation to the marſhal reſpecting the jury, would requeſt him to compoſe it entirely of perſons, who agreed with Callender in political opinions. What is to be inferred from this converſation? That he wiſhed to convict Callender? No. But that as he knew the eaſe to have excited ſtrong party feelings, he wiſhed the perſon accuſed to have a trial which would ſilence clamor, and preclude all ſuſpicion of improper views; ſo that a conviction, ſhould one take place, being free from the imputation of party vengeance, might operate more ſtrongly as an example, to check the licentiouſneſs of the preſs. Surely this motive was humane towards the party accuſed, and highly patriotic as it reſpected the public.

When Callender was taken, the reſpondent, inſtead of committing him immediately to priſon, as he might have done, there to wait till bail ſhould be offered, manifeſted the utmoſt readineſs to let him go out and ſearch for bail, and an anxious

ſolicitude that he ſhould find it. Inſtead of demanding bail in a large ſum, one two or three thouſand dollars for inſtance, which it was in his power to do, he demanded only what Callender himſelf declared he could give: and bail was actually taken, in the very moderate ſum of two hundred dollars.

After the counſel for Callender had been moſt properly over-ruled, on legal grounds, in their attempts to obtain a continuance; the reſpondent being obliged to refuſe the continuance, for which no ſufficient ground was laid, humanely offered to poſtpone the trial, for weeks and months, for the accommodation of the traverſer and his counſel. When this was refuſed, he poſtponed it from day to day, as long as they deſired, to give the witneſſes who were within reach an opportunity of coming in; and offered to iſſue attachments for thoſe who did not appear, which would have induced neceſſarily a further delay.

And, laſtly, when Callender was convicted, and thus placed completely within the power of the court, the reſpondent inſtead of going to the utmoſt verge of the law, in the ſeverity of punishment, fined him only one-tenth of the ſum, and imprisoned him for but little more than a third of the time, which the law allowed. The ſum limited by the law was two thouſand dollars; and the fine impoſed was two hundred. The term of imprisonment which the law allowed was two years; and the time fixed by the court was nine months.

Are theſe, Mr. Preſident, the fruits of a diſpoſition oppreſſive and corrupt? Again I say if this be oppreſſion, God grant that I and mine may never be otherwiſe oppreſſed!

It is urged againſt the reſpondent, under the ſecond charge, that he refuſed to let the indictment be read to the jury, when it was requeſted by Callender's counſel. Why did they wiſh the indictment to be read? It was, they tell us, for the purpoſe of making known to John Baſſet and the other jurors, before they were ſworn, the nature of the charges; and thereby enabling them to declare whether they ſtood indifferent, or had made up and expreſſed an opinion, as to the matter in iſſue. But John Baſſet has informed us, that when the queſtion whether he had formed and expreſſed an opinion was put to him, he was perfectly apprized of the nature of the charges, and knew that Callender was indicted under the ſedition law, for printing and publiſhing "The Proſpect Before Us." As to the other jurors, it is in evidence, that before the queſtion was propounded to them, the reſpondent explained to them fully the ſubject and object of the proſecution, and the nature of the iſſues which they were called upon to try. Where then was the neceſſity, where would have been the uſe, of reading the indictment? It could have informed John Baſſet of that only which he knew before; and the other jurors of that which the reſpondent explained to them, much better than they could have underſtood it, by merely hearing a long indictment read in court. The object of the counſel, they ſay, and certainly the only proper object, was to inform the jury. The judge took a ſhorter and much more effectual method of attaining this object. He clearly and fully ſtated to the jury the matter in iſſue, the points in diſpute, and the legal principles which ought to govern their determination. He told them that Callender was indicted, for printing or publiſhing certain libellous matter extracted from "The Proſpect Before Us;" that he muſt be proved to be the author or publiſher of that book; that the paſſages ſtated in the indictment muſt appear to be contained verbatim in the book, and to be falſe ſcandalous and malicious; and that the book muſt appear to have been publiſhed; with intent to defame the preſident of the United States, and to bring him into diſrepute and contempt. All this he fully explained to the jurors, before the queſtion was propounded to them. Will any one ſay that all this could have been as clearly underſtood by the jury, from ſimply hearing the indictment read? And is a judge to be cenſured, becauſe inſtead of conſuming the time of the court, in reading a long indictment, he took a ſhorter and more effectual method of attaining, the only proper object that could be attained by the reading?

As to the main point of the ſecond charge, the over-ruling of Mr. Baſſet's ſuppoſed objection to ſerving on the jury,

I leave the legal correctneſs of that deciſion, where it has been placed by the teſtimony of Mr. Baſſet himſelf, and by the very learned arguments of my two colleagues, who took up this part of the caſe. But admitting it for a moment to be incorrect, it is not impeachable, unleſs it proceeded from an improper motive. And what evidence of intention to oppreſs, or other improper motive, does it furniſh? The reſpondent did not know, and had no means of knowing, the political opinions of Mr. Baſſet. And if he had known them, they could have furniſhed no reaſon for a particular wiſh to retain that gentlemen on the jury. It would have been very eaſy to find another juror, of the ſame opinions, who would have anſwered the purpoſe equally well. It is in evidence that the city of Richmond, where the court ſat, and from whence a new juror muſt have been ſummoned, had Baſſet's been excuſed, abounded with perſons of the ſame politics. Why then commit a crime, from which it was manifeſt that no advantage could be derived?

Streſs has alſo been laid on the queſtion propounded to the jurors in this caſe; "whether they had formed *and delivered* an opinion on the charges in the indictment"? But this queſtion, it will be recollected, was the ſame which had been ſettled in the caſe of Fries, after much deliberation. This appears by the teſtimony of Mr. Rawle. If, therefore, it were an improper queſtion, it would furniſh no proof of improper intention againſt Callender; ſince it merely followed a precedent, which was eſtabliſhed without the leaſt reference to his caſe; a precedent, too, in which judge Peters concurred. And although judge Peters was, I preſume, included in the general charge of imbecility of character, adduced againſt the diſtrict judges, by the honorable manager who opened the proſecution, he has never been charged with deficiency in legal knowledge.

It has, moreover, been proved undeniably, by my two learned colleagues who diſcuſſed this charge, that this queſtion, as propounded to the jurors in the caſe of Callender, was a great relaxation of the law, in favor of the traverſer. It was therefore an indulgence, inſtead of an act of oppreſſion; and adds one more to the numerous proofs displayed by the reſpondent, in this caſe, of a diſpoſition full of humanity and kindneſs, towards the party accuſed.

Under the third charge, which is founded on the rejection of Col. Taylo 's teſtimony, it has been contended by the honorable managers, that the reſpondent rejected this teſtimony without knowing what it was. But this, ſir, is an utter miſtake. No part of Col. Taylor's teſtimony was rejected, except what related to the three queſtions ſtated by the counſel for Callender. From any thing that appears we cannot conclude, that any other teſtimony which Col. Taylor might have been able to give would have been rejected. It was not ſuggeſted that he could give any other, and there was no queſtion about any other. Into the legal correctneſs of rejecting thoſe queſtions, it is not neceſſary for me to enquire. That point I moſt cheerfully leave to be decided, on the very learned and concluſive arguments of my two colleagues. But I will requeſt the indulgence of this honorable court, while I advert, as briefly as poſſible, to ſome of thoſe conſiderations which ſhew concluſively to my mind, that admitting the deciſion on this doubtful and difficult point of law to have been incorrect, it could not have proceeded from improper intention.

And here let me remark, that the reſpondent could not have been ignorant of Col. Taylor's high ſtanding and character in the ſtate of Virginia, of the influence attached to his name and his opinions, or the reſentment which muſt in all probability be excited, by any act of oppreſſion or impropriety, whereof he might in any degree be conſidered as the object. The reſpondent could not be ignorant of the ſtate of irritation, which then exiſted in that part of the union, on the ſubject of the ſedition law, nor of the extreme offence which muſt be given by any conduct of the court, having or capable of receiving the appearance of oppreſſion under that law. He could not be ignorant that to reject Col. Taylor's teſtimony, was extremely capable of receiving that appearance, and could hardly fail to aſſume it, in the ſtate of perſonal and political feeling which then exiſted. He is admitted on

all hands to be a man of ſenſe; and would a man of ſenſe, without ſome ſtrong motive, commit deliberately a crime, ſo likely to blow up a flame of reſentment againſt himſelf, and thoſe with whom he was connected?

What motive could the reſpondent have, for rejecting, improperly, this teſtimony? To ſecure the conviction of Callender? No; for he was equally ſure of that, without the rejection. Col. Taylor's teſtimony applied to but one charge, and there were nineteen others undefended. If then he rejected this teſtimony, knowing it to be proper, he committed, without motive or object, the crime the moſt likely to heap odium on himſelf, and to bring diſgrace and ruin on the party with which he was connected.

Had he been actuated by a criminal intention to oppress Callender, it is far more probable that he would have received this testimony, believing it to be improper, than that he would have rejected it believing it to be proper. A judge capable of acting deliberately, under the influence of such a design, must be as regardless of the law as of his oath. His considering the testimony as illegal, would not prevent him from receiving it, if receiving it could subserve his purpose, better than in its rejection. In this case it would have served his purpose better. To reject gave him no additional hold on Callender; who was placed completely in his power, by the nineteen undefended charges: but to receive it would throw a cloak of fairness and humanity over his conduct, under cover of which, he might more safely and more fully glut his vengeance. The more he had saved appearances in this respect, the more safely might he have indulged his vindictive temper afterwards.

But it is clearly proved, by his requesting the district attorney to consent to this evidence, that he was actuated not by a wish to exclude it, but by a conscientious belief that it was illegal and inadmissible. This request may perhaps be represented, and I think already has been, as a mere cloak; as an artful subterfuge, to escape from the indignation which he saw rising. But how does this agree with the character of open and high-handed violence, which the honorable gentlemen attribute to the respondent? How does it agree with that incautious openness in his conversation, that indiscreet promptness in his conduct, almost amounting to precipition, which appear throughout to enter essentially in to his character? And had he been thus artificial, thus capable of throwing a hypocritical cloak of candor over his wickedness, must he not have perceived that his true policy consisted in receiving the testimony, without regard to its illegality?

If there could remain any doubt, as to the correctness of his motives in rejecting this testimony, it would be removed by his offer to submit the question to the judges of the supreme court, and to respite the sentence till their opinion could be known: the traverser, in the mean time, remaining at large on bail. It is distinctly stated by Mr. Robertson and Mr. William Marshall, that this offer was made, in reference to the decision of this point. We have had, indeed, some cavilling, about bills of exception in criminal cases. Perhaps the judge may have expressed himself inaccurately. He may have spoken of a bill of exceptions, instead of a case stated; or he may have been misunderstood by the witnesses, in this particular. But it is unquestionably proved, that in substance he offered to submit the question, whether this testimony was properly rejected or not, to the revision of all the judges of the supreme court; to let the sentence await the result of their deliberations; and to grant a new trial, if they should think the decision erroneous. It is well known to every lawyer, that although no writ of error or bill of exception lies in criminal cases, yet it is the usual practice in England as well as in America, when any new and difficult point arises in a criminal trial, to state it for the consideration of a superior court, and to respite the judgment till the decision of that court can be had. The point, in such cases, is regularly argued by counsel, before the superior court; to whose decision the judgment of the inferior court is made to conform. It is also known, that a new trial may be granted in a criminal case, where there is a conviction, though not where there is an acquittal. What the respondent offered in this case, might therefore have been done: and he went further. He offered to assist Callender's counsel in doing it. He offered to them the assistance of his

legal knowledge and experience, in framing the case to be stated on the record, for the consideration of the supreme court This appears from the testimony of William Marshall. It is not for me to decide or to enquire, why those offers, and all the others made by the respondent in this trial of Callender, were contemptuously rejected by his counsel. It is enough for me that the offers were made; and that the conduct of my honorable client in making them, taken in connection with the other circumstances which have been noticed, proves beyond all possibility of doubt, that however erroneous in point of law his rejection of colonel Taylor's testimony may have been, it proceeded from his honest judgment, and not from a corrupt intention to oppress

I come now, Mr. President, to notice some of the charges embraced by the fourth article: and first the refusal to continue the case of Callender till the next term. To prove the correctness of this refusal, in point of law, I desire no better authority than that produced by the honorable managers themselves, from 6. Bacon's abridgement, new edition, page 652. It is there laid down, on the authority of Tidds practice 500, 3. Burrows 1514, and 1. Black. Rep. 436, that "where there is no cause of suspicion, the affidavit to put off the trial, on account of the absence of a material witness, is sufficient in the common form: namely, that the person absent is a material witness, without whose testimony the defendant cannot safely proceed to trial; that he has endeavored without effect to get him subpœnaed, but that he is in hopes of procuring his future attendance. But if there be *any* cause of *suspicion*, the court should be satisfied from circumstances, first, that the person absent is a material witness; secondly, that the person applying has not been guilty of any laches; and thirdly, that he is in reasonable expectation of being able to procure his attendance at some future time." Here it appears that even where there is no cause of suspicion, that is no cause of suspecting, that the application for a continuance is made merely for the purpose of delay, still the affidavit must state, that the party applying for the continuance, "is in hopes of procuring the future attendance of the witness." The affidavit in Callender's case is contained in the Exhibit No. 5, filed with the answer. Let it be examined, and contrasted with this authority. It will be found to contain no such statement; and is, therefore, clearly insufficient, even had the case been free from suspicion of affected delay. But is it possible for any man to say, that it was free from such suspicion, after having heard the testimony delivered at this bar? Has not the leading counsel for Callender, who filed this affidavit, and made the motion for a continuance, impliedly acknowledged that his sole object was delay? Has he not acknowledged that he knew Callender to be incapable of defence, on any other ground than the unconstitutionality of the sedition law; and consequently that he knew the absent witnesses to be unnecessary, and was as well prepared for trial without them, as he could be with them; since nothing that they could prove, could have any effect on that question? Has he not expressly declared, that one great object which he had in wishing for the continuance, was to get the trial before a different judge? When this is admitted by the learned gentleman himself to have been the truth, was it very unnatural that the respondent should suspect it? If he had grounds for suspecting it, of which he was to judge, the authority informs us that there ought to have been circumstances stated by the affidavit, sufficient to satisfy him, that the absent witnesses were material, and that the party applying was in reasonable expectation, of being able to procure their attendance at some other time. No such expectation is stated in the affidavit, which was clearly insufficient on that ground: and a comparison of it with the indictment plainly shews, that the absent witnesses were not material.

The learned managers are therefore entitled to our thanks, for furnishing us with an authority which conclusively establishes our case.

But anmitting the respondent to have decided incorrectly, in refusing the continuance, where is the evidence of improper intention? If it was an honest error in judgment, he is free from blame.—And how can we doubt the uprightness of his intentions, when we recollect, that although he considered himself unauthorised to grant a continuance till the next term, because it was not a matter of mere

diſcretion, and no legal ground for it was in his opinion ſhewn, he yet offered a poſtponement for ſix weeks, which it was in his power to grant without legal cauſe? This offer to poſtpone for ſix weeks, which throws ſo ſtrong a light of upright intention and humane indulgence, on the whole conduct of the reſpondent, has been forgotten by Mr. Hay; but fortunately for us, it is diſtinctly remembered by three or four moſt reſpectable witneſſes; and eſpecially by Mr. Edmond Lee and Mr. William Marſhall. There can be no doubt of the fact. It is even manifeſt that three or four months would have been allowed, had they been aſked for. To give ſix weeks would have made it neceſſary for the judge to return home, in order to hold the court in Delaware; and when he had returned, it would have been more agreeable and convenient to remain ſome time at home, than to hurry immediately back to Richmond, in order to hold the court at the end of ſix weeks. How is this humane and accommodating offer to poſtpone, at a great inconvenience to himſelf, to be reconciled with a corrupt diſpoſition to oppreſs Callender? And why ſhould the reſpondent refuſe to continue the caſe till the next term, which would have expoſed him to no inconvenience or trouble, and yet offer to poſtpone it for ſix weeks, at the expence of a new journey to Richmond? It could have been for no other reaſon, than a belief that he was obliged by the law to refuſe the continuance, and a deſire to indulge the traverſer and his counſel, as far as the rules of law would permit.

Here again, I forbear to enquire into the motives of Callender's counſel, for refuſing this indulgence, by which they would have completely obtained all the legal and proper objects of a continuance.—With their motives we have nothing to do. It is into the motives of the judge alone that we are bound to enquire; and of the purity of them this offer ſo indulgent and humane, and ſo unaccountably rejected, leaves no doubt.

As to the rude unuſual and contemptuous expreſſions, which are charged under the fourth article, and have been detailed by one of the witneſſes for the proſecution, it is material to remark, how different an impreſſion theſe expreſſions made on different perſons, according to the various ſtates of mind in which they were heard. Mr. Hay was ſo highly irritated, as to conſtrue a bow into an affront. There had been much mirth at his expence, in which, Col. Taylor tells us, he did not at all partake; and he thought thoſe expreſſions rude and contemptuous. To Col. Taylor, who, though perhaps not inclined to view the reſpondent's conduct with very favorable eyes, had not the ſame cauſes of irritation with Mr. Hay, and was far more cool, they appeared in the leſs exceptionable light, of "imperative ſarcaſtic and witty." Mr. Gooch may be conſidered perhaps as favorably inclined towards the reſpondent, but has ſhewn no diſpoſition to extenuate his conduct, and he regarded theſe expreſſions, as mere efforts on the part of the reſpondent, to ſhew his wit. Wit, I allow, has nothing to do on the bench. If a judge ſhould happen to poſſeſs it, attempts to diſplay it in the diſcharge of his official duties, would perhaps be unbecoming, or even improper; but certainly not criminal. To Mr. Baſſett, who appears to be of a warmer temperament, and whoſe feelings ſeem to lean towards the reſpondent, thoſe expreſſions appeared to be firm without being imperative, and facetious but not ſarcaſtic. And is criminality to be inferred from acts, which thus receive their hue, not from any thing in themſelves perceptible to this honorable court, but from the characters the feelings and modes of thinking of thoſe who relate them? If ſo, then innocence and guilt muſt depend not on the conduct of the accuſed, but on the temper and diſcernment of the witneſſes. The chief juſtice of the United States, who was preſent during all thoſe tranſactions, ſaw nothing improper or unuſual in the conduct of judge Chaſe. Theſe expreſſions, which ſo forcibly ſtruck the heated and angry mind of Mr. Hay, conveyed no idea of impropriety to the mind of the chief juſtice; a gentleman as remarkable for the delicacy of his manners, as for quick diſcernment and ſound underſtanding. Mr. Edmund Randolph was in court during a great part of Callender's trial, and he perceived in the conduct of the court, nothing rude unuſual or indicative of a diſpoſition to oppreſs. I appeal to all who have the pleaſure of knowing that gentleman, whether ſuch conduct

could have taken place, without arresting his attention. So remarkable himself for urbanity of manners, and correctness of personal deportment, he must have been shocked by so glaring a departure from them, in a judge, seated on the bench. That lively and instinctive sense of propriety, which forms the basis of refined good breeding, would have made him feelingly alive to such a departure, in such a place, from that line of conduct, which decorum no less than duty prescribes to a judge. On those finely attuned nerves, which render him the delight of every social circle where he appears, expressions rude and contemptuous would have grated most harshly, and would have made an impression not to be forgotten. Yet Mr. Randolph remembers no such expressions.

And we find no less difference between the different witnesses, respecting the specific terms of these expressions, than respecting their general character. Of this one instance may suffice. Mr. Hay has stated that the respondent interrupted Mr. Wirt, and rudely and preremptorily ordered him to sit down. The expressions which this witness attributes to the respondent, on this occasion, are, "sit down sir;" than which the language furnishes none more harsh or indecorous. But from the testimony of Mr. Robertson, a disinterested spectator, who took down in short-hand all that passed at the trial, it appears that the expressions addressed to Mr. Wirt were, "please sir to be seated." And Mr. Gooch, who attended the trial for the express purpose of observing all that passed, states that the respondent, being about to deliver an opinion while Mr. Wirt was up, said to that gentleman, "please sir to take your seat." Thus it is that passion distorts every object to the view, magnifies mole-hills in o mountains, and converts the most complaisant phrases into "rude unusual and contemptuous expressions!" To the heated imagination of Mr Hay, the expressions which he has detailed no doubt appeared in that light; but this honorable court will be guided, not by the exaggerated and distorted views presented to his irritated mind, but by the testimony of those calm and dispassionate spectators, who were able to view the subject through an unclouded medium.

Let me now, Mr. President, be indulged in one or two remarks, respecting the interruptions of counsel, which form one of the charges under this article. Mr. William Marshall has told us that he remembers a case, in which counsel were more frequently interrupted by judge Iredell, than they were on this occasion by the respondent. We all know the character of that eminent and excellent judge, whose just eulogium the honorable managers have pronounced at this bar, and whose example they have set up as a standard, whereby to measure the conduct of the respondent. Will they not in this instance consent to be judged by their own rule? Will they still insist on condemning in the respondent, that which has been practised to a greater extent by judge Iredell?

But we know the cause which produced the greater part of these interruptions; and which rendered them proper and necessary. Mr. Bassett has informed us, that Callender's counsel appeared to rest their case, wholly, on the unconstitutionality of the sedition law; that they wished to argue this point before the jury, and had flattered themselves with the hope of success; that after the court had formally declared this attempt to be improper, and that the jury could not take cognizance of the question, they continually renewed the attempt, and as often as they did so were stopt by the court. This statement is supported by Mr. Gooch and Colonel Gamble. And will any man say that under such circumstances, it was not proper to interrupt the counsel? Will any man say, that counsel ought to be suffered to fly in the face of the court's authority, and to set at nought its orders and decision?

These interruptions, moreover, as the chief justice has informed us, were made in the ordinary manner of the judge, and were not more frequent, than was usual with him in civil cases. Therefore they afford no proof of an oppressive disposition towards Callender, or of an improper disposition towards any person. They afford proofs of that promptness, sometimes bordering on precipitation, which is well known to make part of his character. It is in proof, by the testimony of Mr. Pur-

ellance, who has long practiſed in courts where the reſpondent preſided, that he is much in the habit of interrupting counſel, even thoſe to whom he is known to be moſt ſtrongly attached; that in his interruptions there is no diſcrimination, between his friends and thoſe who are not ſo; and that if counſel when thus interrupted keep their temper, and coolly and reſpectfully inſiſt on their right to be heard, they never fail to obtain a hearing, and frequently ſucceed in removing impreſſions, which the judge had too haſtily taken up againſt their cauſe. If here be weakneſs, there is magnanimity which attones for it: and if in this caſe Mr. Hay, inſtead of contemptuouſly leaving the court, when he thought himſelf improperly interrupted, had maintained his ground with firmneſs, but with that reſpectful manner alſo which was due to the age and ſtation of the judge, and which would have been highly becoming in himſelf, there is no doubt that he would have obtained, as full a hearing as he could have deſired.

On the "indecent ſolicitude" charged by this article to have been manifeſted by the reſpondent, for the conviction of Callender, I will remark, that if its exiſtence had been proved, ſtill it broke out into no overt act of oppreſſion or injuſtice, and therefore is not the object of puniſhment, or of judicial cognizance. Intentions, unleſs accompanied by acts, ſolicitudes and wiſhes, unleſs carried into effect, are offences unknown to our criminal code, and inconſiſtent with the principles of our conſtitution.

The fifth and ſixth charges, relative to the operation of the Virginia laws on the caſe of Callender, and their ſuppoſed violation by the reſpondent, have been ſo ably and clearly refuted, by my two learned colleagues who immediately preceded me, that nothing remains to be ſaid on thoſe points. I will merely remark, that had an error been committed, in awarding a capias againſt Callender on the preſentment, and making it returnable to the court then ſitting, it would have been the error of the diſtrict attorney and the clerk, for which the reſpondent could have been in no manner anſwerable. It is in evidence by the teſtimony of the clerk himſelf, Mr. William Marſhall, that when the preſentment againſt Callender was returned into court, the reſpondent, then ſitting alone, aſked Mr. Nelſon, the diſtrict attorney, what was the proper proceſs in ſuch a caſe; who anſwered, a capias; and that the capias which actually iſſued, was immediately drawn up at the bar, by the clerk, was inſpected by Mr. Nelſon, and was then ordered by the judge. In a caſe of this nature, relating to the local laws and practice of the ſtate, the reſpondent, being then unaſſiſted by the diſtrict judge, could apply to no better guide than the clerk and the diſtrict attorney, both at that time practitioners in the ſtate courts; and had they led him into an error, which they certainly did not, it would be the height of abſurdity as well as of injuſtice, to impute it to him as an offence.

I have now, Mr. Preſident, concluded my remarks on thoſe charges, which ariſe out of the trial of Callender.—

(Mr. Harper was proceeding to the next article, when, it being three o'clock, a motion was made to adjourn til the next day. When the queſtion was about to be taken, Mr. Harper obſerved to the court, that although an adjournment would be a perſonal convenience and gratification to him, yet if his wiſhes could be at all conſulted, he would prefer to conclude his argument on that day; that the time had become very ſhort, which afforded ſome ground to apprehend, that a poſtponement of the deciſion till next ſeſſion might be thought neceſſary: and that it was, therefore, extremely deſirable, and very much deſired by his client and himſelf, to cloſe the argument as ſoon as poſſible.

An adjournment for half an hour was then moved and carried.)

When the court met again, Mr. Randolph ſtated that with the conſent of the reſpondent's counſel, he wiſhed to examine Mr. Hugh Holmes, a witneſs who had been ſummoned and attended, to corroborate the teſtimony of Mr. Heath.—Mr. Harper, on the part of the counſel, gave his conſent, but an objection was made by a member of the court; on the ground, it is preſumed that after the evidence was cloſed, and the arguments commenced, no new teſti-

mony could regularly be received; not even by consent. On the question being taken, there appeared a majority for receiving the testimony. And Mr. Holmes was accordingly sworn.

Hugh Holmes sworn.

Mr. Randolph.—We wish to know whether John Heath, in the Spring of 1800, mentioned to you at Richmond, a conversation which he had heard between judge Chase and the late Marshal of Virginia, concerning the jury that were to try Callender?

Mr. Holmes.—I was in Richmond in May, 1800, while the circuit court was sitting. It was commenced on a Wednesday, and I left Richmond the Sunday following. During that time Mr. Heath informed me, that he had gone to judge Chase's chambers on business, and while there Mr. Randolph, the marshal, came in with a paper in his hand, and that judge Chase asked him what it contained —that the reply was that it was the pannel of the jury to try Callender. Judge Chase asked him whether there was a certain description of people on it, and if there were, to strike them off.

Question.—Are you certain that this conversation was related to you, during the the time you have mentioned?

Answer.—The impressions on my mind are that it was; it must have been, if related in May, because I am certain that I left Richmond on the Sunday after the commencement of the circuit court. It might have been told me the September following, when I attended the chancery court, where Mr. Heath, judge Brooke, General Minor and myself practised. I think judge Brooke and General Minor were present when Mr. Heath related the conversation.

Q. You were not present at the trial of Callender?

A. I was not. I left Richmond on a Sunday, and Callender was tried on the Tuesday week following.

Questions by Mr. Nicholson.

Are you certain that you left Richmond on the Sunday after the commencement of the circuit court?

A. I am. I was obliged to leave there, in order to attend the court at Winchester, and I am certain that I arrived at court.

Q. When does the court at Winchester sit?

A. The Monday before the first Tuesday in every month.

Q. Do you recollect whether that court was held the first or second Monday in the month?

A. It is impossible that it could have been the second Monday. It must either have been the first Monday in June, or the last Monday in May.

Hugh Holmes, cross-examined by Mr. Mr. Harper.

Q. Do you recollect on what day Mr. Heath related this conversation to you?

A. I do not.

Q. What time of the day was it?

A. I am not certain, but my impressions are that it was in the evening.

Mr. Harper.—This testimony of Mr. Holmes, Mr. President, completes the overthrow of John Heath, whom it was adduced to support. It adds the last clench to the nail, by which his testimony is fixed on high. This honorable court will recollect that John Heath declared, that as soon as the conversation between judge Chase and the marshall, about striking those "creatures called democrats" from the jury summoned to try Callender, took place, which was in the morning before the court met, he went immediately on the hill, and related that conversation to Hugh Holmes. This, consequently, must have happened before Mr. Holmes left Richmond. He tells us that he left Richmond on Sunday which was the 25th of May. We know from the record evidence in the cause, as well as from the testimony of Mr. William Marshall and some other witnesses, that Callender was not brought to Richmond until the 27th of May. And it is well known that by the practice of Virginia, a jury is never summoned to try an offender, till he is before the court, and puts himself upon trial. Consequently, at the time when John Heath informed Mr. Holmes, that he had seen the marshal present to

the respondent, the pannel of jurors summoned for the trial of Callender, and had heard the respondent tell the marshal, to strike off all the "creatures called democrats," it is perfectly certain that no jury had been summoned; that the marshal had not taken Callender; that it was perfectly uncertain whether he would be taken; and that no such circumstance as Heath related to Mr. Holmes, could possibly have taken place. For this flat contradiction of their witness, we are indebted to the honorable managers, and we tender them our thanks. They have furnished us, by the testimony of the same respectable witness, with another contradiction of minor importance, but not undeserving of notice. Heath says that he made this communication to Mr. Holmes in the morning. Mr. Holmes states, as his strong belief, that it was made in the evening. So much for the testimony of Mr. John Heath; which I leave, without further remark, where it has been placed by Mr. David Mead Randolph, Mr. William Marshall, and Mr. Holmes; and proceed to consider the transactions at New-Castle in Delaware, which form the matter of the seventh charge.

And here three questions present themselves for examination. What was the respondent's conduct on that occasion? How far was that conduct conformable to duty and propriety? What were the motives from which it proceeded?—On all the previous articles, the same division of the matter presented itself to the mind; but the two first grounds were fully occupied by my learned colleagues. What remained for me, belonged almost entirely to the third division. Here, and on the eighth charge, being deprived of their able assistance, it is incumbent on me to consider the subject, under each of these three points of view.

As to the conduct of the respondent, he admits in substance that he did, on the first day of the court, decline to discharge the grand jury, on their request; did state to them some information which he had received, respecting a seditious printer in the town of Wilmington, who was said to be in the habit of violating the act of congress called the sedition law; and did inform them that it was their duty to enquire into that affair. He also admits that he requested the district attorney to assist them with his advice, in making this enquiry. But he denies that he did utter those expressions, relative to a seditious temper in the state of Delaware, or any part of it, with which he is charged.

That he uttered those expressions is sworn by Mr. George Read, the district atrorney of Delaware, and Mr. Lee, one of the grand jurors. Four witnesses on the contrary, equally respectable and equally intelligent with Mr. Read and Mr. Lee, have deposed that they were present, that they attended particularly to what passed, and that they heard no such expressions. First judge Bedford, who sat by the side of the respondent at that time, who must have heard all that was said, and who appears to have remarked particularly what the respondent said, on the subject of seditious publications: for he afterwards told him, that he had used expressions which would give offence. Yet judge Bedford did not hear any such expressions, as are stated by Mr. Reed and Mr. Lee. Next Mr. Vandyke, the attorney general of the state of Delaware; a gentleman of high character, whose manner of delivering his testimony, proves him to be very capable of accurate observation. He attended in court at this time, and was attentive to the proceedings; but he heard nothing of these remarkable expressions. Then Mr. Hamilton, who attended the court as an assistant to his father the marshal, sat near the judges, listened to the conversation between the respondent and the jury, but heard nothing of these remarkable expressions. And fourthly Mr. Hall, who was in court during the whole time, paid particular attention to what passed, but heard nothing of this seditious temper in the state of Delaware, and particularly in the county of New-Castle, and more especially in the town of Wilmington. On Mr. Moore so much stress cannot be laid, as on the former witnesses, because he was not particularly attentive to what passed on the first day. Leaving him, however, out of the case, we have four witnesses against two; and those four witnesses were so situated, that they must have heard those expressions had they been uttered, and must have remarked them.—Judge Bedford did remark expressions of

leſs ſtrong, which he was apprehenſive might give offence. Is it poſſible then to believe that thoſe very offenſive expreſſions, had they fallen from the reſpondent, could have eſcaped his notice?

But there is another piece of evidence, ſtill ſtronger than the teſtimony of theſe witneſſes. We know that within a day or two after theſe tranſactions took place, an account of them was publiſhed by the printer, and in the Gazette, which had been the object of the reſpondent's animadverſion. This publication is in evidence before the court. It is ſufficiently exaggerated, but it makes no mention of theſe remarkable and offenſive expreſſions. This printer, it is very evident, was extremely well diſpoſed, to repreſent the reſpondent's conduct in the moſt unfavorable light, that truth would juſtify. He no doubt received his information of what paſſed, from perſons who felt the ſame diſpoſition. Thoſe perſons muſt have heard theſe expreſſions had they been uttered, muſt have been ſtruck by them, and ſurely would not have ſuppreſſed them.

When this maſs of evidence ſtands oppoſed to Mr. Reed and Mr. Lee, can we heſitate to pronounce that they have ſtated what never took place? I am far from intending to charge them with intentional departure from truth. No doubt they underſtood in this manner ſomething that was ſaid. But it is plain that there muſt be a miſtake ſomewhere. Their teſtimony cannot be reconciled with that of the four witneſſes for the reſpondent; or of the printer, which, under the circumſtances of this caſe, is ſtronger than all the reſt: and it is much more probable that two men ſhould be miſtaken than four; and that all the ſix ſhould be miſtaken, than that this printer ſhould have been uninformed of, or ſhould have omitted to notice, thoſe expreſſions, if they had been uſed by the reſpondent.

Theſe expreſſions indeed contain nothing criminal. To uſe them would not have been an impeachable offence: but it would have been an act of great indecorum and impropriety. It was the duty of the judge to charge the grand jury, and to point their attention to any ſpecific offences againſt the laws of the United States, which had come within his knowledge or information; but to utter indiſcriminate abuſe againſt a whole ſtate or county, to charge the people of it generally with a ſeditious temper, would have been equally extra-judicial and unbecoming. This conſideration, we hope, will be admitted as an apology, for occupying ſo much time in the refutation of a charge, which in every other point of view is manifeſtly frivolous and futile. We wiſh to reſcue the conduct of our honorable client, from the imputation of impropriety as well as of guilt.

It may perhaps be replied, that we rely on merely negative teſtimony, to diſprove theſe expreſſions, while poſitive teſtimony is adduced to prove them. But whether teſtimony ought to be regarded as poſitive or merely negative, depends on the ſituation of the witneſſes, and the circumſtances of the caſe. When a man ſwears that he did not ſee a tranſaction, which might well have taken place without his ſeeing it, his teſtimony is merely negative, and can have no weight againſt that of a witneſs, who ſwears that he did ſee the tranſaction. But when it is of ſuch a nature that it could not poſſibly, or within the bounds of reaſonable probability, have taken place, without being ſeen by the perſon who ſwears that he did not ſee it, the teſtimony of ſuch perſon then aſſumes the character, and poſſeſſes the weight, of poſitive teſtimony. It is the ſame as if he had ſworn poſitively, that no ſuch tranſaction did take place. If, for inſtance, a witneſs were to ſwear, that he ſaw a man ſtanding with his hat on, during the whole of this trial, in the open ſpace on the floor between the preſident and; me and every other perſon preſent were to ſwear, as they no doubt would, that they had ſeen no ſuch perſon: ſurely no man in his ſenſes would put this on the footing of mere negative teſtimony, and contend that the firſt witneſs was to be believed againſt all the others! And where is the difference between the two caſes? It conſiſts, I anſwer, ſolely in the number of witneſſes: for it is as impoſſible that thoſe expreſſions ſhould have been uttered by the reſpondent, without being heard by judge Beford, Mr. Vandyke, Mr. Hamilton, and the perſons who gave information to the printer, as that a man ſhould ſtand for an hour with his hat on, in the middle of this floor, without being obſerved by the audience.

We are, therefore, warranted in laying these expressions out of the case; and then to what does it amount? There was a law of the United States, for the punishment of seditious libels, which the respondent, as judge of the circuit court for Delaware, was bound to enforce in that district. On his way to the court he receives information, that certain habitual violations of this law are committed, within the district. This information is given to him, as appears from the testimony of Mr. Hall, by a justice of the peace for that district, whose duty it was to attend to such offences, and to take all legal steps for bringing the offenders to justice. The information, derived from this official and authentic source, the respondent communicates to the grand jury; observing to them that it was their duty to enquire into the matter, and that they must remain in session one day more, for that purpose. He goes further. He requests, or, if the honorable managers will have it so, he order, the district attorney to assist them with his advice in making this enquiry; and directs a file of the newspapers, supposed to contain these libellous publications, to be procured and laid before them. This is the "head and front of his offending." And will the honorable managers be pleased to point out the rule or principle of law, that was violated by these acts? Will they be so good as to inform us, whether it was not the duty of the grand jury, to enquire concerning offences within the district, and of the judge to give in charge to them, all such offences as had come to his knowledge?—Suppose that instead of a breach of the sedition law, a piracy had taken place on the high seas, and information had been given to the judge, that the pirates were lurking in the district of Delaware, would it not have been his duty to state this information to the grand jury, and to direct them to enquire concerning the offence? And I again call on the honorable gentlemen, as I had occasion to do in a former part of the case, to inform us by what authority and what criterion, a judge is to distinguish some offences from others, to prosecute some, and let others, as far as depends on him, escape with impunity.

The honorable gentleman who opened the case on the part of the prosecution, admitted distinctly, in his opening speech, that a judge may properly be zealous and active, in the execution of the criminal law generally; and he bestowed very high, and probably very just, encomiums on a judge of Virginia, whom he represents as thus zealous and active. But it is zeal and activity in the execution of this particular law, that he imputes as a crime to the respondent.

But if this zeal and activity in the respondent, be not confined to this particular law, of which there is not the least proof or pretence; how, I ask, can it be an offence, according to the principle of the honorable gentleman? Surely each particular law is a part of the whole body of law. How, will the honorable gentleman be pleased to inform us, is it possible to be zealous and active as to the whole, without being so as to each of the parts? Will he inform us how the laws can be executed except by parts; and whether it ever did or could happen, that they were all violated at once.

There is, however, a more serious objection to this principle, which, if it be correct, goes to invest the judiciary with a power infinitely more formidable and alarming, than has ever yet been contended for, in this, or, as far as I know, in any country.

In what part of our constitution, or of our system of jurisprudence, have the honorable gentlemen found this dispensing power of the judges, over a part of the laws? Was not the sedition act, while it continued in force, a law of the land?—Were the courts of justice to neglect its execution, because it had been opposed by a political party in the legislature, or was disagreeable to a portion of the people?—Are the honorable gentlemen willing to be tried by this their principle? Let them, before they answer in the affirmative, examine how far it will carry them. We now have circuit courts, and associate judges to hold them. We now have, and probably always shall have, parties in congress and in the country. It is very possible that laws may be passed, which will be highly disagreeable to one of those parties. Are gentlemen prepared to say, that the judges may dispense with the execution of all laws, which they suppose to be of

this deſcription? If gentlemen find this principle intolerable and abſurd, when applied to laws paſſed by themſelves, will they ſtill inſiſt on its application to ſuch, as were heretofore paſſed againſt their opinion? Or will they contend that the queſtion, whether a perſon ſhall be puniſhed for the violation of a law, ſhall depend on the popularity or unpopularity of the law, in the particular diſtrict where the offence is committed? Is a judge, appointed to hold a criminal court, to enquire from the people of the diſtrict, or from popular leaders, what laws he ſhall execute? Ought he to take his information on this ſubject from political parties, inſtead of the ſtatute book? Would this be living under equal laws, equally impartially and ſteadily adminiſtered? And do not ſuch laws ſo adminiſtered, conſtitute the very eſſence and definition of free government?

On principle then, even the principle admitted by the honorable gentleman himſelf, who opened the proſecution, the conduct of the reſpondent, in directing the attention of the grand jury to this offence, is ſtrictly juſtifiable. But it does not reſt on principle alone. It is ſtrongly ſupported by precedent, both in England and this country. In the Lawyers' Magazine, an authentic collection of legal proceedings and adjudications, vol. 3, page 333, we find a charge delivered to a grand jury by Chief Baron Perryn, in which he calls their attention to certain particular offences.—In page 384, of the ſame book, we find Lord Loughborough calling the attention of a grand jury, to particular offences. In the fifth vol. of the ſame work, page 199, there appears a charge of Judge Aſhhurſt, in which he directs the attention of the grand jury to certain ſeditious printers.—And in the report of Hardy's trial, we ſee the celebrated judge Eyre, as illuſtrious for his juſtice humanity and love of liberty, as for his profound knowledge of the law, and his great talents as a judge, directing the attention of a grand jury to a particular offence.

Paſſing from England to this country, we find judge Iredell, whoſe example has ſo often been held up for imitation, directing the attention of the grand jury, in a very particular and emphatical manner, to the particular caſe of the Northampton inſurgents. This took place at the circuit court at which theſe inſurgents were to be tried; and the charge was delivered to the ſame grand jury, which found the firſt indictment againſt John Fries. And we have another authority more directly in point, becauſe it occured in the caſe of a ſuppoſed libellous publication. It is alſo furniſhed by a judge of great legal reputation and talents, whom I truſt the honorable gentleman will not conſider as inimical to liberty, or diſpoſed to judicial oppreſſion. I mean Mr. M'Kean, formerly chief juſtice and now governor of Pennſylvania. In a charge delivered to a grand jury of the city and county of Philadelphia, on the 27th of November, 1797, after a very elaborate and luminous expoſition of the law relative to libels, he informs them that a certain printer in that city, meaning Cobbett, the publiſher of Porcupine's Gazette, was and long had been in the habit of offending againſt this law, by the publication of ſcandalous and malicious libels; that he had interfered, and endeavored to arreſt the progreſs of this offender, by binding him over to be of the good behaviour; that the printer, in contempt of his recognizance, and in defiance of the authority of the law, perſiſted in his miſchievous courſe; and that the duty of arreſting him now devolved on the grand jury, by whom alone the ſtrong corrections appearing to be neceſſary, could be applied.—The expreſſions uſed by this learned and able judge, are ſtrong and remarkable. I will take the liberty of preſenting him to the court in his own dreſs. (Here Mr. Harper read the charge from Claypole's Gazette of Nov. 28th or 29th, 1797.)

It will be remarked that the printer in this caſe, had not been bound over to appear at the court, and anſwer for a libel; but had beeu bound in a recognizance to be of good behavior, which he was ſuppoſed to have violated by publiſhing further libels. On this recognizance a civil action had been brought; and the grand jury, who had nothing to do with the recognizance, nor any information before them, were thus called upon to apply a further corrective, by preſenting the offender. It is impoſſible that a caſe ſhould be more exactly in point. Indeed it goes much farther, than the conduct of the reſpondent at New-Caſtle.

I am far from condemning, or calling in queſtion, the conduct of the late chief juſtice of Pennſylvania, in this inſtance. But I contend that the ſame act which has been conſidered as proper in him, ought not to be imputed as a crime to my honorable client.

Thus we ſee that the conduct of the reſpondent, in this inſtance, was ſtrictly correct, whether it be teſted by principle or precedent. If this could be doubted, if it were even admitted that he acted incorrectly, it would ſtill be clear that he acted from proper motives; that his error was a mere error of judgment; and conſequently cannot be the ground of a conviction on impeachment.

Had he been conſcious of improper intentions, how eaſy was it for him to accompliſh his object, without appearing in the buſineſs! When Dr. M'Mecken, from whom, as Mr. Hall tells us, the reſpondent received the information, mentioned theſe publications to him, it would have been eaſy to requeſt that gentleman to give the information to the grand jury. Dr. M'Mecken no doubt would have complied with the requeſt; the grand jury would have obtained the information; the printer, had it appeared proper to them, would have been proſecuted; and the reſpondent would have attained his end, without in the leaſt expoſing himſelf to view. Would he not have acted thus, had he been conſcious of improper deſigns? With criminal plans of oppreſſion in his mind, would he not have ſought concealment, where it was ſo eaſily practiſed, and could in no degree have impeded his projects? Undoubtedly he would. Nothing but a conſciouſneſs of upright views could have induced him, in ſuch circumſtances, to act this frank and open part.

In judging of mens' motives it is material alſo, to liſten to their private converſations, addreſſed at the time, to thoſe in whom they have confidence. In ſuch converſations the hearts of the moſt cautious are apt to expand, and the moſt hidden views are ſometimes diſcloſed. What was the reſpondent's reply to judge Bedford, when that gentleman cenſured him for acting imprudently, in recommending in that part of the country, an enquiry into offences againſt the ſedition law? "My dear Bedford," to uſe the beautiful language of the reſpondent, as repeated by the witneſs; "my dear Bedford, no matter where we are, nor among whom we are, we muſt do our duty." This, ſir, is the language of the heart; not of a corrupt heart, filled with plans of oppreſſion and violence, but of a heart manly upright and honorable. It bears the intrinſic character, and the ſtamp, of ſincerity and truth. It is a frank and unſtudied avowal of motives, made to a confidential friend, in an unſuſpecting moment; and it is of more avail than volumes of teſtimony, to ſhew the real impreſſions under which he acted.

Remember, too, how readily, and in what good humour, the reſpondent gave up this point, and acquieſced in the opinion of the grand jury and the diſtrict attorney, when they declared that they had found nothing libellous in the papers. Having acted from a ſenſe of duty, in calling the attention of the grand jury to the ſubject, he was content with having diſcharged his duty, and preſſed the matter no further. But had he acted from a vindictive ſpirit of oppreſſion, or any other improper motive, inducing him to wiſh for the proſecution of the printer; would he ſo readily have deſiſted? The file of papers was within his reach. We who have examined it, know that he might have found in it libellous matter enough. And would he not have examined it? Would he not have pointed out the libellous paſſages to the grand jury? Would he not have ſent them out again, with ſtronger injunctions to do their duty? Do oppreſſors ſo readily abandon their projects, when the accompliſhment is ſo much in their power? No ſir. This conduct in the reſpondent is utterly inconſiſtent, with any other motive than that ſenſe of duty, under which it is manifeſt that he acted throughout.

We come now, Mr. Preſident, to the eighth charge; under which I find myſelf again obliged to perform the diſagreeable taſk, of contrafting evidence, and controverting the teſtimony of a witneſs for the proſecution. This witneſs, Mr. Montgomery, has attributed to the reſpondent

expreſſions, relative to the character motives and views of the preſent adminiſtration, which, had he uttered them from the bench, ought to draw on him the cenſure of the public, and the ſevere animadverſion of this tribunal. Theſe expreſſions I am authoriſed by him expreſsly to deny and diſclaim. He contends that according to the cuſtom of this country, ſubſiſting for almoſt thirty years, without any mark of public diſapprobation, he had a right to warn his fellow-citizens, in a charge from the bench, againſt the political dangers by which he believed them to be threatened; to aſſiſt in this manner in averting impending ruin; in ſnatching the people of his native ſtate, from an abyſs into which he thought them about to plunge. He contends that for this purpoſe, and according to this cuſtom, he had a right to point out what he conſidered as the pernicious tendency, of certain meaſures of the federal government; in order to ſhew in a ſtronger light, the danger of adopting ſimilar meaſures in the ſtate. This is what he did, and what he ſuppoſed himſelf authoriſed to do. But he neither claims nor has exerciſed the priviledge, of abuſing thoſe who have been appointed to adminiſter the government of his country; nor of paſſing ſtrictures, in his official capacity, on their character motives and general conduct.—However he may differ from them in political opinion; however he may diſapprove their principles; whatever apprehenſions he may entertain about the tendency of their meaſures; he has always inculcated obedience to them, in the exerciſe of their conſtitutional powers, and has carefully avoided any remarks, in his judicial character, on their ſyſtem views and conduct. When he could not approve their meaſures he was ſilent: except in this ſingle inſtance; where, in order to diſſuade the people of Maryland, from the adoption of a conſtitutional amendment, then under conſideration, which he conceived to be fraught with ſo many evils, he adverted to the conſequences likely, in his judgement, to flow from one of thoſe meaſures.

Thoſe very reprehenſible expreſſions, "that the preſent adminiſtration was weak incapable and unequal to the proper diſcharge of their duties; and that the object of their meaſures was not to promote the public good, but to preſerve unfairly acquired power;" are attributed to the reſpondent by one witneſs alone, Mr. Montgomery of Maryland. How far that witneſs is entitled to credit, in this particular, it is my duty to enquire.

Let us advert, Mr. Preſident, to the ſtate of mind in which this witneſs was, at the time when thoſe expreſſions are ſuppoſed to have been uttered.

He informs us that he was the author and chief ſupporter, of thoſe meaſures of the Maryland legiſlature, againſt which the reſpondent levelled his artillery; that he conſidered himſelf as particularly pointed at; and ſuppoſed the eyes of the audience to be turned upon him. So greatly was he irritated by this imaginary attack on himſelf, that as he left the room, after the charge was finiſhed, he declared that the reſpondent ſhould be impeached for that charge. This we learn from the teſtimony of Mr. M'Mecken, who heard the declaration. After he went home, he wrote an inflamatory piece for the preſs, purporting to be the ſubſtance of the charge. This piece was avowedly written, for the purpoſe of promoting an impeachment. It recommends that meaſure; abounds with the moſt approbrious and abuſive language againſt the reſpondent; and, what is ſtill worſe, it varies very materially, from the teſtimony which the author of it has delivered at this bar.

Is it ſurpriſing that a man in this ſtate of mind, ſhould miſconceive the truth? Is it to be wondered at that he ſhould convert his own inferences, the miſconceptions and diſtortions of his own heated brain, into facts? Have any members of this honorable court, heard a perſon give an account, in a court of juſtice, of a quarrel in which he had been himſelf a party? Of a brawl or riot in which he had been himſelf engaged, in which he had perhaps been beaten, and of his wrongs in which he came to complain? Have they obſerved how the truth, in ſuch ſituations, is diſtorted by the blindneſs of paſſion, the partiality of ſelf-love, and the thirſt of revenge? I preſume that they have; and they will then know how to appreciate the teſtimony of a witneſs, in

the ſtate of mind in which Mr. Montgomery viewed theſe tranſactions, and in which he has given evidence at this bar.

I have ſaid that this publication, purporting to be the ſubſtance of this charge, varies materially from his teſtimony in this caſe. For the truth of this ſtatement I refer to the publication itſelf, which is in evidence before the court, and to his teſtimony, which is in the recollection of the honorable members. But I will point out one of the moſt remarkable variances. In the publication he repreſents the reſpondent as ſaying, "that in a country where there were equal rights and equal laws, that is laws equally adminiſtered and that operate equally upon the rich and the poor, there was freedom; but that country was *not* ours; we had *no* equal rights or equal laws." In his teſtimony, as taken down by the ſhort-hand writer, he repreſents the reſpondent as ſaying, "that where there were equal laws and equal rights, there was freedom; but where the adminiſtration of the laws was partial and not certain, the people were not free: and that we were approaching to that ſtate of things." In his publication he accuſes the reſpondent of ſaying, we actually were in this condition: in his teſtimony, that we were approaching to it. Is it poſſible to give credit to a witneſs, who thus contradicts himſelf? And what aſſurance can we have, that he whoſe memory is ſo treacherous, and who is proved by his publication to have been ſo angry, has not ſtated his own impreſſions and inferences as matters of fact?

This witneſs has indeed made an attempt to ſupport himſelf, by an explanation of this part of his teſtimony. In his explanation he tells us, that although he attributed the word "adminiſtration" to the reſpondent, the word uſed might perhaps have been "government." In this way he endeavors to get rid of the contradiction, between himſelf and the numerous other witneſſes. But this cannot avail him. The expreſſions whether applied to the adminiſtration or the government, muſt in this inſtance have meant the ſame thing. The charges of weakneſs, relaxation, incapacity, and a view to the continuance of their unfairly acquired power, inſtead of the public good, could have had no application to the government in its general abſtract nature. They could have applied to it only as adminiſtered, by the perſons or the party now in power. So that whether the term "government" or "adminiſtration" was uſed, the meaning was preciſely the ſame. The expreſſions were equally remarkable, in one caſe as in the other. They muſt have ſtruck the by-ſtanders as much, in one caſe as in the other. They were in fact the ſame, with the variance of a ſingle word, which did not in the leaſt vary the ſenſe. The witneſſes have all ſworn that they heard no ſuch expreſſions; and the contradiction is as ſtrong after the explanation, as it was before.

Who are thoſe witneſſes thus ſtanding oppoſed to Mr. Montgomery? Thoſe witneſſes that were preſent, and attentive, and yet did not hear thoſe remarkable expreſſions, which he heard ſo diſtinctly, and which he tells us made ſo ſtrong an impreſſion on his mind? If when he ſtood on his own merits, and on the compariſon between his publication and his teſtimony, he was ſo weak, how muſt he appear when oppoſed by this hoſt of witneſſes?

Firſt Mr. Maſon. That gentleman, indeed, was ſo much occupied by the ſalutations of his friends, that he did not attend accurately to the whole charge: although he had leiſure enough to remark what nobody elſe ſaw; that the reſpondent, in the intervals of reading his charge, ſometimes ſeemed to indroduce extemporaneous obſervations, by way of comment on what he read. Still he has given us, with great confidence and no leſs accuracy, the principal points of the charge. He recollects nothing of theſe expreſſions. Can it be believed that they would not have ſtruck him, had they been uſed? Mr. Maſon is one of the ſtrongeſt adherents, one of the warmeſt and moſt zealous friends, of thoſe who now adminiſter the government. Indeed he is one of the chief props of the preſent adminiſtration; united with it in intereſt principle and affection. He is, moreover, ſo accurate in his obſervation, and ſo correct in his recollection, about what relates to the reſpondent, as to be able, after a lapſe of five years, to repeat a caſual and jocular converſation; which is uſually forgot-

ten as soon as it passes. Can it then be believed, that so outrageous an attack on his friends, by this judge, and in such a place, could have escaped his notice, or been effaced from his memory?

Next Mr. Smith, editor of the National Intelligencer, than whom the present administration certainly has not a more zealous friend. He is indeed remarkable, for the devotedness of his attachment to this administration, his lively and keen sensibility to all its wrongs, real or imaginary, and his vigilant and unwearied zeal in its defence. He is, moreover, remarkable for his talent of stating in writing, whatever he has heard spoken or read; a talent into the careful cultivation and constant exercise of which, he is led by his profession. He listened attentively to this charge. After hearing it, he sat down in his chamber, the same evening, and committed the substance of it to writing; for the express purpose of publishing it in his paper. This publication he has produced and attested; and it contains no such expressions about the present administration, or the present government, as were heard by Mr. Montgomery. Is it possible to believe, that had such expressions been used, they would not have been heard by Mr. Smith; or that if he had heard them, he would have omitted them in his publication?

Mr. Stephen too, who is known to be strongly attached to the present administration, was present at the delivering of this charge, attended to it, but heard no such expressions as those related by Mr. Montgomery. A multitude of other witnesses, who stood round the respondent, while he delivered the charge, who were all for various reasons very attentive to it, have with one voice declared that they heard no such expressions. Among them is the district judge, who sat by the side of the respondent; the clerk of the court, who sat next to him but one, and who moreover is an adherent of the present administration; the foreman of the grand jury, who stood close to the respondent, and to whom the charge was particularly addressed; and one of the judges of this district, who attended that court as a witness, and stood very near to the respondent, while he delivered the charge. The others are gentlemen of the bar, men of high character, who have delivered their testimony with great accuracy, and assigned with candour and precision the reasons of their belief. And all those persons declare most positively, that they heard no such expressions as have been related by Mr. Montgomery, about the conduct character and views of the present administration.

Nay more. The charge was read from a written paper, and that paper is produced in court, and proved by the person who wrote it, from a rough copy furnished by the respondent. Mr. Mason, it is true, states that some extemporaneous comments appeared to him to be made by the respondent, while reading from a written paper; and the inference to be drawn from this, I presume, is, that these expressions might have formed one of these extemporaneous comments; and, therefore, might have been used, though they do not appear in the paper. But Mr. Mason, it will be remembered, though very correct and positive in stating the substance, does not pretend to accuracy in the particulars. He was too much interrupted by the salutations of his friends, who pressed through the crowd to speak to him. And it may very well have happened that when, after these interruptions, he turned his attention again to the respondent, he sometimes found him with his eyes raised from the paper, as those of every man will be who reads his own composition, or any writing with which he is familiar. This might have led him to conclude, that the respondent sometimes spoke extempore. But Mr. Montgomery himself has stated that the whole charge was read from a paper; and the same fact has been established by the testimony of nine or ten witnesses, among whom are the district judge, and the clerk of the court. Those gentlemen sat near to the respondent, while he delivered the charge. One of them far next to him, and the other next but one. They were both attentive to the manner in which the charge was delivered; and they both say that it appeared to them to be entirely read. They both say that the respondent, in reading it, occasionally raised his eyes from the paper, at the close of a sentence, and turned them on the audience; but not longer, at any

one time, than is uſual with a perſon reading. In this the other witneſſes fully concur. They all ſtood round the reſpondent, had their eyes fixed upon him during the whole time, and were particularly attentive to the manner as well as the matter of the charge.

Mr. Montgomery, indeed, after he had heard the teſtimony of Mr. Maſon, explained himſelf on this ſubject. He ſaid at firſt, that the whole charge appeared to him to be read from a written paper. But after he heard Mr. Maſon ſtate that the reſpondent, in delivering the charge, ſometimes appeared to leave the paper, and introduce extemporaneous matter, he was called again; and he then informed us, that his eyes were not conſtantly directed towards the reſpondent, but were occaſionally turned on the bye-ſtanders; whoſe eyes he obſerved to be directed to him, as the known author of the meaſures reprobated in the charge. From this he inferred, very properly, that the reſpondent might have ſpoken extempore, from time to time, without his obſerving the fact.* This explanation certainly removes the contradiction, which at firſt appeared between Mr. Maſon and Mr. Montgomery; and weakens materially the teſtimony of the latter gentleman, as to the fact now in queſtion. But it has no ſuch effect on the teſtimony of the other witneſſes, whoſe attention was not called off, like that of Mr. Montgomery; who had their eyes upon the reſpondent during the whole time; and who firmly believe that every word which he delivered, was read from the paper. This fact, then, I conſider as completely eſtabliſhed. The paper has been proved, and is in evidence before the court. A true copy of it will be found among the exhibits filed with the anſwer, No. 8. On examination it will be found to contain no ſuch expreſſions, as are attributed to the reſpondent by Mr. Montgomery.

The teſtimony of Mr. Montgomery on this point, thus liable to ſuſpicion in itſelf, on account of the ſtate of irritation in which he ſaw the tranſaction; thus contradicted by his own written ſtatement, by the teſtimony of ſo many witneſſes, and by the written charge; is not entitled to belief, but muſt be laid wholly out of the caſe. I do not charge him with wilfully miſtating the fact; but that he has utterly miſtaken it, cannot be doubted.

There is another point on which ſome contrariety appears in the teſtimony.—Some of the witneſſes have ſuppoſed that the reſpondent concluded the charge, with a direct recommendation to the jury, to uſe their endeavors, on their return home, towards preventing the final paſſage of the act of aſſembly of Maryland, for aboliſhing the ſupreme courts; by procuring the election in their ſeveral counties, of ſuch perſons as would vote againſt that meaſure. Others are under the impreſſion, that no ſuch recommendation was expreſsly made; but was merely to be inferred from the general tenor of the charge. That ſuch a difference of opinion ſhould take place, is by no means ſurprizing; but the difference is immaterial. The object of the charge undoubtedly was, to diſſuade the people of Maryland from adopting the meaſure in queſtion; and to impreſs on the grand jury and the audience, the neceſſity of exerting themſelves againſt it, at the election which was then approaching, and was to decide its fate.—If this recommendation was not expreſsly given, it was plainly implied. Such was the intention of the reſpondent; and his defence reſts on the correctneſs of this intention; on his right, according to the long eſtabliſhed cuſtom of this country, to purſue the object in this way.

Let the charge, Mr. Preſident, be carefully examined; and it will be found to have no object in view, but to convince

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* *We are authorized to ſtate that the teſtimony of Mr. Montgomery, in this part of it, has not been correctly repreſented by the ſhort-hand writer. What he ſaid is correctly ſtated, but not in the order in which it was ſaid. In the report it appears as if all that Mr. Montgomery ſaid on this ſubject, had been ſaid at the ſame time. But that is not the fact. He ſtated at firſt that the charge appeared to be read; and the part which immediately follows this, in the report, was given in evidence after Mr. Maſon had been examined.—This fact, we are informed, attracted much attention at the time, and will be atteſted by all who attended particularly to the teſtimony.*

the people of Maryland, by arguments drawn from reaſon and experience, of the danger of adopting a change in their ſtate conſtitution, which had been ſubmitted to their conſideration, and the object of which was to aboliſh all their ſupreme courts of law; to introduce a ſyſtem entirely new and untried; and above all to deſtroy the independent tenure of judicial office, ſecured to them by their exiſting conſtitution, and to leave the judges dependent on the executive for their continuance in office, and on the legiſlature for their ſupport. The reſpondent, who had contributed largely to the formation and eſtabliſhment of the ſtate conſtitution, was greatly alarmed at theſe changes. He conſidered them as of the moſt deſtructive tendency, to the liberty and happineſs of the ſtate to which he belonged; and he reſolved to take this opportunity, of warning his fellow citizens againſt them. This is the whole ſcope of his addreſs to the grand jury: to ſhew the importance of an independent judiciary, the dangerous tendency of ſome changes already made, and the miſchiefs which would reſult from taking this additional ſtep, in the career of innovation. He did, indeed, advert to the act of congreſs for repealing the circuit court law, and remarked that it had ſhaken to its foundation the independence of the federal judiciary; but the manifeſt and ſole object of this was to ſhew, that the ſpirit of innovation had gone forth, and ought to be carefully watched; that the public reſpect for great conſtitutional principles, had begun to be weakened; and that by how much the ſecurity which might have been derived, from an independent federal judiciary, had been diminiſhed, by ſo much the more vigilently it behoved us to guard our ſtate inſtitutions. No other object can be diſcovered in the charge, or inferred from its general tenor, or from the language in which it is expreſſed; neither is there any evidence, which has the moſt remote tendency to ſhew, that he had any other object in view.

And was not this an object which a citizen of this country might lawfully purſue? Is it not lawful for an aged patriot of the revolution, to warn his fellow-citizens of dangers, by which he ſuppoſes their liberties and happineſs to be threatened? Or will it be contended that a citizen is deprived of theſe rights, becauſe he is a judge? That his office takes from him the liberty of ſpeech, which belongs to every citizen, and is juſtly conſidered as one of our moſt invaluable privileges? I truſt not. And if there could be any doubt on this point, I would remove it by referring to a recent inſtance, of two judges of the ſupreme court of Maryland, who in a late political conteſt, entered the liſts as champions for the rival candidates, and travelled over a whole county, making political ſpeeches in oppoſition to each other. Yet theſe gentlemen juſtly poſſeſs the confidence and reſpect of the public; their conduct in this inſtance has never been conſidered as a violation of duty; and he who eſpouſed the intereſts of the ſucceſsful candidate, has been far from receiving any marks of diſpleaſure, from the government of this country.

If therefore a judge retain this right, notwithſtanding his official character; if it ſtill be lawful for him to expreſs his opinion of public meaſures, to oppoſe by argument ſuch as are ſtill pending, and to exert himſelf for obtaining the repeal, by conſtitutional means, of ſuch as have been adopted; I aſk what law forbids him, to exerciſe theſe rights by a charge from the bench? In what part of our laws or conſtitution is it written, that a judge ſhall not ſpeak on politicks to a grand jury?—Shall not advance, in a charge from the bench, thoſe arguments againſt a public meaſure, which it muſt be admitted that he might properly employ, on any other occaſion? Such conduct may, perhaps, be ill-judged indiſcreet or ill-timed. I am ready to admit that it is ſo: for I am one of thoſe who have always thought, that political ſubjects ought never to be mentioned in courts of juſtice. But is it contrary to law? Admitting it to be indecorous and improper, which I do not admit, is every breach of decorum and propriety a crime? The rules of decorum and propriety forbid us, to ſing a ſong on the floor of congreſs, or to whiſtle in a church. Theſe would be acts of very great indecorum, but I know of no law by which they could be puniſhed as crimes.

Will they who contend that it is contrary to law, for a judge to ſpeak of poli-

tics to a grand jury, be pleaſed to point to the law of the land which forbids it? They cannot do ſo. There is no ſuch law.—Neither is there any conſtitutional proviſion or principle, or any cuſtom of this country, which condemns this practice.

And will this honorable body, ſitting not in a legiſlative but a judicial capacity, be called on to make a law; and to make it for a particular caſe, which has already occurred? What, ſir, is the great diſtinction between legislative and judicial functions? Is it not that the former is to make the law, for future caſes; and that the latter is to declare it, as to caſes which have already happened? Is it not one of the fundamental principles of our conſtitution, and an eſſential ingredient of free government, that the legiſlative and judicial powers ſhall be kept diſtinct and ſeperate? That the power of making the general law, for future caſes, ſhall never be blended in the ſame hands, with that of declaring and applying it to particular and preſent caſes? Does not the union of theſe two powers in the ſame hands, conſtitute the worſt of deſpotiſms? What, ſir, is the peculiar and diſtinguiſhing characteriſtic of deſpotiſm? It conſiſts in this, ſir; that a man may be puniſhed for an act, which when he did it was not forbidden by law. While, on the other hand, it is the eſſence of freedom, that no act can be treated as a crime, unleſs there were a preciſe law forbidding it, at the time when it was done.

It is this line which ſeparates liberty from ſlavery: And if the reſpondent be condemned to puniſhment for an act, which far from being forbidden by any law of the land, is ſanctioned by the cuſtom of this country for more than twenty years paſt, then have we the form of free government, but the ſubſtance of deſpotiſm.

Let gentlemen, before they eſtabliſh this principle, recollect that it is a two edged ſword. Let them remember, that power muſt often change hands in popular governments; and that after every ſtruggle, the victorious party comes into power, with reſentments to gratify, by the deſtruction of their vanquiſhed opponents; with a thirſt of vengeance, to be ſlaked in their blood. Let them remember that principles and precedents, by which actions innocent when they were done may be converted into crimes, are the moſt convenient and effectual inſtruments of revenge and deſtruction, with which a victorious party can be furniſhed. Let them beware how they give their ſanction to principles, which may ſoon be turned againſt themſelves; how they forge bolts which may ſoon be hurled on their own heads. In a popular government, where power is ſo fluctuating, where conſtitutional principles are therefore ſo important, for the protection of the weaker party againſt the violence of the ſtronger, it above all things behoves the party actually in power, to adhere to the principles of juſtice and law; leſt by departing from them, they furniſh at once the provocation and the weapons, for their own deſtruction.

I have ſtated, Mr. Preſident, that the practice of introducing political matter into charges to grand juries, has been ſanctioned by the cuſtom of this country, from the beginning of the revolution to this day. Need I advance any other proof of the fact, than its general notoriety? Need I refer to the charge delivered in South-Carolina, in 1796, by William Henry Drayton, for which he has been ſo much admired and applauded? Need I refer to the recommendation of the executive council of Pennſylvania, at a period ſomething later, in which that body, with John Dickinſon at its head, enjoins it on the judges, to avail themſelves of their charges to the grand juries on their circuits, for diſſeminating correct political information and principles, among the people? Shall I refer to the caſe of judge Addiſon in Pennſylvania, who has delivered many political charges; and againſt whom, when he was lately impeached, thoſe charges made no part of the accuſation? Shall I refer again to the charge of judge Iredell, delivered to the grand jury which found the firſt indictment againſt John Fries, and containing a variety of political matter? It is unneceſſary to dilate on theſe inſtances. They have been given in evidence, and are freſh in the memory of this honorable court. The recollection of the honorable members muſt furniſh them with many others equally ſtriking.

And yet have the authors of none of these political charges been censured. No mark of public or private disapprobation has been fixed on their conduct. No legislative act has forbidden this practice. From the time of judge Drayton to the time of judge Chase, it has been considered as innocent. It remained for the year 1803, after a lapse of twenty-seven years, to discover its criminality. But this honorable body will not so determine. It will not forget the distinction, between its judicial and its legislative character. In its judicial character it will declare that an act, however improper in itself or dangerous in its tendency, shall not, if forbidden by no law, be punished as a crime; that the prevalence of this custom for twenty-seven years, the countenance which it received from some governmental authorities, and the acquiescence of all, are sufficient evidence of its legality; and that the criminal intent which constitutes an essential ingredient of the offence, in this as in every other case, and of which no direct proof is now adduced, can never be inferred from the act itself, when done in compliance with a custom so long established, and so highly sanctioned. But if the members of this tribunal should be individually of opinion, that this custom is dangerous or improper, they will, after pronouncing a sentence of acquittal in this case, resume their legislative character, and pass a law to restrain the practice in future. Thus will the mischief be prevented on one hand, and the principles of liberty and justice respected on the other.

This charge, therefore, fails like the rest; and what remains of the accusation? It has dwindled into nothing. It has been scattered by the rays of truth, like the mists of the morning, before the effulgence of the rising sun. Touched by the spear of investigation, it has lost its gigantic and terrifying form, and has shrunk into a toad. Every part of our honorable client's conduct has been surveyed. All his motives have been severely scrutinized: all his actions have been brought to the test of law and the constitution: his words, and even his jocular conversations, have been passed in strict review: and the ingenuity and industry of the honorable managers, have been unable to detect one illegal act, one proof or one fair presumption of improper motive.

Perceiving perhaps by anticipation, this desperate situation of his case, the honorable gentleman who opened the prosecution, has devised another expedient, to escape from anticipated defeat, and to ensure that conviction on which he seems to have set his heart. He has told us; and no doubt will hereafter insist, that in order to form a true judgment on the respondent's conduct, the whole of it must be embraced in one view; and all the particulars regarded as parts of one whole. This means, if it means any thing, that although no single act alledged in the articles, should be considered as an impeachable offence, and a sufficient ground of conviction, yet all the acts taken together, may constitute such an offence. That is, in other words, that many nothings may make something: that many noughts may make a unit: that many innocent acts may make a crime. What is this but recurring, in another form, to the absurd and monstrous doctrine, that judges may be removed on impeachment, for reasons of expediency, without the proof of any specific offence? No sir, this last subterfuge will not avail the prosecutors. This honorable court, adhering to the principles of the constitution, the positive rules of law, and the plain dictates of justice and common sense, will require, before it convicts, the clear proof of a criminal intent, manifested and carried into effect, by some act done in violation of the laws. Under the shield of this great principle, our honorable client stands secure. In full confidence that you Mr. President and the members of this honorable court, will be guided by it; I chearfully submit his case to you. And when you retire to deliberate on it, remember that posterity will sit in judgment on your conduct; that her decision will be pronounced on the testimony of impartial history; and that from her awful sentence there lies no appeal.

TUESDAY, February 26th, 1805.

The court being called as usual, Mr. Nicholson rose and said:—

Mr. PRESIDENT,

The house of representatives having impeached Samuel Chase, one of the associate justices of the supreme court of the United States, for high crimes and misdemeanors, and evidence having been adduced both against and in favor of the accused, and counsel having been heard in his defence, it becomes my duty as one of the managers to reply. To me this duty is an unpleasant one. Under all circumstances the office of a public prosecutor is painful, but more especially so when the object of the prosecution is covered with age and infirmity. I speak the sentiments of the house of representatives when I say that this impeachment would never have been instituted, if they had not believed, that the offences committed by the respondent were of such a nature that the best interests of the country required that the offender should be punished. But the happiness of society materially depends upon the free administration of justice which the respondent is charged with perverting. We may make laws for the benefit of our country, but they will be of little avail if the tribunals of justice are not faithful in the discharge of their duty. If our laws are not faithfully and impartially administered; if justice is to suffer her pure garment to be stained by political venom, we may boast of having the shadow of freedom, but we have lost the substance. In this point of view I admit the case to be an important one, fully as important as the counsel for the respondent have contended that it is. But I trust that this honorable court will not suffer themselves to be influenced by that kind of appeal which has been made by the counsel. I trust that the frequent observations that posterity will judge of the sentence to be pronounced on judge Chase, will have no influence in the decision. To secure the approbation of posterity is an honorable feeling, but to secure it we must pursue the dictates of our own consciences. It is true that our fellow-citizens are looking with an anxious solicitude to the decision of this cause, and as the counsel have said a condemnation will not be a proof of the guilt of the judge; and I thank God that an acquittal will not establish his innocence. If, sir, it shall ever be the fortune of my humble name to be handed down to posterity, I shall not fear their sentence on my vote upon impeaching the respondent, and my acting as one of the managers in support of the impeachment. No, sir, it will be my boast, and I trust that no member of this court will be afraid to submit his vote to posterity. If the judge is guilty, posterity will heap on him the odium which he will so justly merit, if innocent let the odium fall on his accusers. The facts submitted to this court will be presented by the faithful historian to posterity and upon them will their judgment be formed and not upon the sentence here. Sidney and Russel bled on the scaffold, but ample justice has been done to their memories, and their suffering an ignominious death, has not been deemed a proof of their guilt, nor because Scroggs and Jeffries escaped the punishment due to their crimes, have posterity failed to execrate their characters. The gentleman who first spoke in defence of the respondent (Mr. Hopkinson) gave another example of the little respect which the world pays to the verdict of a court when it appears to be erroneous. He mentioned the case of Warren Hastings who was acquitted. But although he was acquitted has his innocence been established? No, sir, his acquittal has fixed a foul stigma upon the English character, and it has been said that the plunder of empires was the best proofs of his innocence, for by that he was acquitted. I trust that this court will not have their sympathies or fears excited by being told of the frosty head of the respondent, and that posterity will judge of the sentence. I ask what sympathies we have endeavored to enlist against the respondent as we were charged by the gentleman who spoke yesterday (Mr. Harper.) What could induce that gentleman to say so, I am at a loss to determine. We have endeavored to excite no sympathies, we have not addressed our arguments to the feelings of the court, we come here in the name of the house of representatives to demand justice, and we have made no exertion to gain the feelings of the world and posterity. If any

sympathy is to be excited in the minds of the members of the court, it ought to be for their own families, on account of the effect which their verdict may have on their children. Our fathers have handed down a fair fabric to us, and we demand justice on the respondent that we may hand it down to our posterity. We were also told yesterday, that when the ground on which we stood had shrunk from us and the impeachment could not be supported by the evidence, that we resorted to the forlorn hope that an impeachment was not a criminal prosecution but a mere inquest of office.

I did not hear any such remarks fall from any of the managers. If they were made I disclaim them, and think I can answer for my brother managers. This is a criminal prosecution, and we mean to support it as such, and if no criminal act has been committed by the respondent we do not ask his conviction. The learned attorney-general of Maryland, might have saved himself the trouble of attempting to prove that every citizen of the United States is not liable to impeachment because we readily concede that point. But we mean to contend that in order to sustain an impeachment, it is not necessary that the offence should be an indictable one. And I trust I shall be able to support that position. This was one of the principal grounds of defence made by the respondent's counsel. And in order to shew that it cannot be sustained I need take no other course than that pursued by them. I might refer to a number of authorities where persons have been impeached, without any charge being made of their having violated any law, but I confess I had rather examine this question under our own constitution, and that it should be expounded without any reference to English authorities. I see no other reason for our reference to them, than because we speak the same language. In the first section of the third article of the constitution, it is declared "that the judges both of the supreme and inferior courts shall hold their offices during good behavior." I contend that if the constitution had not afterwards declared that "all civil officers might be impeached and removed from office," that under this section a judge might be removed for misbehavior in office. In all the authorities misbehavior in office is defined to be a breach of duty. A misdemeanor in office is therefore nothing more nor less than an improper discharge of the duties of the office, or the omission to do an act which the officer is bound to do. In the fourth section of the second article of the constitution it is declared, that "the president, vice-president and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors." Upon this section I mean to ground my argument that an officer is liable to impeachment in many instances where the offence is not indictable. Treason, which is particularized in the section which I have just read, is certainly an indictable offence. Bribery is also an indictable offence in a judge, but suppose the president should receive a bribe, where is he to be indicted for it? We have no court of ordinary jurisdiction that can take cognizance of the offence. Suppose the president were to attempt to influence the votes of the members of congress upon a particular question, and should promise them offices, surely no gentleman will contend that he is not liable to an impeachment for such an offence, and yet he cannot be indicted for it. If one of the secretaries were to receive a bribe from a foreign government no court of ordinary jurisdiction could take cognizance of it, and yet he might be impeached. The gentleman who closed the defence (Mr. Harper) admitted that the ground taken by his colleague (Mr. Hopkinson) that it must be an indictable to render it an impeachable offence, could not be supported; but he took another ground that the offence must be against some known law. This ground I also believe to be erroneous. A judge may cause a trial to be by eleven jurors; this would be a gross misbehavior in office, and an impeachable offence; because it would tend to subvert the right of a trial by jury, and yet it would not be an indictable offence, nor do I know of any known law which it would contravene. No law exists to prevent the president from exercising his influence with members of congress, nor the judges from delivering political charges, but I conceive them both to be impeachable offences.

The gentleman who opened the de-

fence observed that no lawyer would use the word "misdemeanor," unless as applicable to an offence against law. I wish to know against what law the gentleman meant. Does it mean an offence against the common law, the statutes of England, the statutes of the United States or the laws of the different states? If I were addressing a court of my own state upon the subject of a misdemeanor, I should speak of an offence against some laws of the state. If before a magistrate, I should speak of such offences as he had a right to punish, and here, as a manager, I speak of misdemeanors in office, and I have shewn that a number may be committed for which the offender can not be indicted. If the objection of the counsel means any thing, it is that no officer can be impeached unless the offence be of such a nature as would make him indictable in the courts of the United States. One of the counsel contended that to render an offence impeachable it must be indictable, and another says there must be some violation of a positive law. And has referred us to the state and common laws. They have admitted that no habitual drunkenness and profane swearing on the bench would render a judge liable to impeachment, but have contended that those are indictable offences. I do not think they are so in this country, except under some of the state laws. They are punishable in England in the ecclesiastical courts and are only punishable in the temporal courts under a statute of James the first which was never in force in this country. The attorney general of Maryland observed, that there were offences for which a judge would be impeachable although not done in his judicial capacity, to wit, such as were of so heinous a nature as to require an infamous punishment. Let us examine this argument. In Maryland, if a man gets drunk or swears he may be fined and upon his refusal to pay the fine, the magistrate may order him to be whipped, or put him in the pillory. Here then would be an infamous punishment, and a judge in Maryland, according to the argument would be liable to an impeachment; while in Virginia, perhaps the punishment may not be infamous and the judge would escape. Under a system of laws once established in Connecticut called the blue laws, a judge might be publicly whipped for saluting his wife on the Sabbath-day, but in Maryland no such laws existed, therefore what would be deemed an impeachable offence in one state would not in the other. It is therefore improper for this court in trying an impeachment for offences committed against the United States to resort either to state-laws, or to the common law to ascertain impeachable offences. In my opinion the constitution has defined impeachments which means any misbehaviour in office, and this honorable court are to judge whether the respondent has misbehaved himself in his judicial capacity. The law of impeachment is the law of justice and of truth; it is one which the Creator has given us. It is conscience. It is that law which is engraven on the hearts of men in indelible characters. Every man ought to conduct himself with propriety, and his own conscience must make the law. Let us then examine how far this sense of propropriety has been followed by judge Chase as to the first article of impeachment, to which I shall confine my observations. We were told by the gentlemen who opened the defence, that the case had been argued on the part of the managers, from the articles of impeachment, and not from the evidence. Sir, I shall endeavor to shew that this article is not at variance with the evidence, but is supported by it. The same gentleman has told us that there is but one truth in the first specification, which is, that judge Chase formed and reduced an opinion to writing on the law of treason. This is not a charge against the respondent, and the gentleman might have saved himself the trouble of proving that no injury could result from the judge's informing his mind on the case. The charge against the respondent is, that he delivered the opinion before counsel were heard, and in the presence of the jury, and that it tended to bias them against the prisoner.—In answer to this it has been contended, that Mr. Lewis was the person who gave publicity to the opinion. Mr. Lewis could not have made known the contents of the paper, because he had no knowledge of it. It must have become known by the conduct of the judge, who informed the counsel of the contents and then threw it down on the bar table, when it was copyed. All the

witnesses have declared that they never witnessed a similar procedure. I shall undertake to prove that judge Chase delivered his opinion in such a manner as tended to make an impression on the minds of the jury. Upon this point we have the testimony of Mr. Lewis and Mr. Dallas, but I do not intend to rely altogether on their evidence. The answer of the respondent is sufficient for my purpose. In the fourteenth page of the answer the judge declares, that he did inform Mr. Lewis that the court were of the same opinion concerning the law of treason, as had been before decided in the case of Vigol and Mitchell, and on the first trial of Fries." What was this, but declaring that the acts charged against Fries amounted to treason? And this opinion was delivered in the presence of all the bystanders. The jury were informed that the opinion which the court intended to give, was the same which had been given before, when Fries was found guilty. The plain inference to be deduced from this declaration of the judge is, that the court had determined that Fries was guilty of treason. But it has been said that the court gave no opinion as to the facts. In answer to this, I will observe, that there was no dispute as to the facts, and the counsel have stated that they meant to rest their defence solely on the law; and the respondent in the twelfth page of his answer admits "that it was not suggested that any new evidence was to be offered," and the evidence was precisely the same as had been offered at the trial when Fries was found guilty. The respondent and his counsel have told us that the forming and delivering this opinion was intended as a service and a favor to the counsel for Fries, and to apprise them of the law and that they might seek new testimony: This could not possibly have been the reason which influenced the judge, because the opinion was delivered on the very day, when Fries was brought into court for his trial, and that was far from being a proper time for the counsel to seek new testimony. If the judge had been governed by any consideration of this kind, would he not have made an earlier communication to the counsel for Fries? But in the very same answer in which the judge gives this reason for delivering the opinion, he states "that it was not suggested that there was any new evidence," certainly then this excuse deserves the epithet which has been applied to it by one of the managers, it is "an unworthy evasion." No advantage could have resulted then to the counsel or their client, because no dispute existed as to the facts. Another reason assigned by the judge is, the great number of civil suits which were for trial at that term, and therefore that the time of the court ought not to have been wasted. If this were a reason, how was the time to be saved? The same arguments would have been used by the counsel to the jury, whether the court had made up their minds or not. The reasons assigned for the conduct of the judge are different and this court will decide whether they are correct or not. I wish not to say what were the motives which induced the judge to adopt such a novel and extraordinary procedure. It is not my office to impute improper motives, but in my opinion his conduct was highly improper. An impression has been attempted to be made on this court by asserting that the opinion delivered was correct, and that the arguments of Messrs. Lewis and Dallas could not have had any weight, because they would not have been correct. Sir, I do not agree with the judge and his counsel, that the opinion delivered in the case of Fries, with respect to the law of treason, was a correct opinion, nor can I believe that I shall suffer in reputation for this disagreement; and I will take the liberty of offering a few observations to shew, that there was nothing extravagant in the opinion, that the court was incorrect. The constitution declares "that treason shall consist in levying war against the United States. The court said the terms "levying war," must receive a constructive exposition, in a legal manner.—There are some authorities which consider this a question of law, while others deem it a question of fact. This, however, is not important. The court, in the case of Fries, considered it a question of law. I will here beg leave to refer to the opinion of a very eminent judge in Virginia, who is of a different opinion with the respondent on the law of treason. I shall read a passage from Tucker's edition of Blackstone, not to shew that the opinion of the court, in the case of Fries, was incorrect, but to shew that there was nothing extravagant in believing it so. [Here Mr. Nicholson read a passage from

the fourth vol. Tucker's Blackstone, page 11, on the subject of treason.] I have read this to shew that the opinion of judge Chase on the law of treason, is not the universal opinion ; but that a judge of a very high standing doubts its correctness. The first instance of constructive treason in England, after the statute of Edward the first, was under the reign of Henry the eighth, and the next in the reign of Elizabeth. In the reign of king Charles the second, while that eminent judge, sir Matthew Hale, was on the bench, a case occurred similar to the one of Fries.— The case was reserved for the opinion of twelve judges, and they declared it to be treason, but sir Matthew Hale differed in opinion with them. His reasons are stated at large in Kelynge's reports. In the first trial of Fries, there was a declaration by the district attorney who prosecuted Fries, "that what in England was deemed a *constructive* levying of war, must in this country be deemed a *direct* levying of war." I ask then whether there was any thing extravagant in the wish of Mr. Lewis and Mr. Dallas, to address the jury on the law, after Sir Matthew Hale's doubting on it? So far from thinking them deserving of censure, I as an individual return them my thanks for their conduct, and I trust that on a similar occasion there will be found men bold enough to assert their rights and save the constitution. I trust that counsel will always in a case of treason insist upon going before the jury on the law, and endeavor to obtain an exposition of the constitution different from that which has been given to it. We have been told that it is the universal practice for courts to reduce their opinions to writing on the law, before counsel have been heard, and Kelynge is cited as an authority to shew that the judges in England met on a certain occasion to settle the law, before the trial of persons for treason. Let it be remembered, that this was immediately after the restoration of king Charles the second, and the persons who were to be tried were accused of the murder of his father. At that time no person was safe who would sing hosannas to the king, and manifest their zeal by the destruction of the enemies of his father. Surely then, a case which occurred at such a time, can form no precedent to excuse judge Chase. But even were it proper, even had such a decision been made at any other time, it would furnish no precedent for the conduct of judge Chase. It is true, that the judges in England did meet before the trial and determine the law, but they had modesty enough to keep their opinions to themselves, and did not disclose them to the jury, before counsel were heard. But judge Chase did deliver his opinion in open court, and in the presence of a number of the jury. This I have clearly proved by the answer of the judge. And he must have formed and delivered his opinion from a perfect knowledge of the facts, for the attorney-general of Maryland has said that judge Chase had the benefit of the notes of judge Peters and Mr. Rawle, and it was not suggested that any new evidence would be adduced.— I presume it will be unnecessary to dilate longer on the first specification, and will proceed to the second. It charges the judge "with restricting the counsel for Fries from recurring to such English authorities as they believed apposite ; or from citing certain statutes of the United States which they deemed illustrative of the positions upon which they intended to rest the defence of their client." In answer to this the gentleman who opened the defence observed, that the counsel on both sides were restricted, and therefore no partiality could be shewn. Sir, what was the restriction placed upon the attorney for the United States? I am at a loss to discover any, except that of being prevented from defending John Fries, and in this he was restricted by his oath of office. It could be no restriction to tell him the law was on his side. Mr. Lewis's testimony upon this point deserves more credit than Mr. Rawle's. Mr. Rawle took no notes on the first day, and was too much occupied in his official situation to pay much attention to what transpired. Mr. Lewis was a party concerned, and must have paid particular attention to what was said by the judge, and his evidence is corroborated by the answer of the judge. Mr. Rawle recollected nothing about any restriction with respect to the statutes of the United States, and he has stated one fact different from what is stated by the respondent. He stated, that the judge declared that one of the copies of the opinion was to be delivered to the jury, to take out

with them, whereas the judge states precisely as Mr. Lewis does, that the opinion was to be delivered to the jury after the opening of the case by the district attorney. I shall, therefore, consider that the testimony of Mr. Lewis, is entitled to more credit than the rest of the witnesses. Mr. Lewis stated that the court said, that the counsel should not read the statutes of the United States to the jury. Mr. Dallas stated, that after having been informed by Mr. Lewis of what had transpired, he went into court and mentioned to the judges what had been told him, and that it was not denied. I therefore shall take it for granted, that the counsel were restricted from citing the statutes of the United States, as well as decisions in England before the revolution. What was the reason that the counsel for Fries wished to cite those English authorities? It is evident they wished to shew to the jury, that the construction which had been given in England to the terms "levying war," was given in the worst of times, and that the judges since the revolution, had considered themselves bound by the decisions prior to that period. They wished to read the statutes of the United States to shew, that congress did not consider that the offence with which Fries was charged, amounted to treason, and surely the congress of the United States had as much right to give a construction to the terms "levying war," as the court had. We have been told that if the court conceived those authorities to have no connection with the case, they had a right to prevent their being read, and a distinction has been taken between the power and right of the jury to decide upon the law in criminal cases. This is novel to me. I always conceived that this right had never been denied to the jury. But if they have the power, and no law has been made to restrict it, most indubitably they have the right to decide questions of law as well as fact, in criminal cases. If a jury would be servile enough to adopt the opinion of the court when they believed it erroneous, and tamely surrender their right of deciding the law in criminal cases, they would deserve the punishment of attaint. This attempt to justify the conduct of the judge, bears some evidence of guilt. Gentlemen are afraid to rest the case on the facts. I hope, however, that the right of the jury to decide the law in criminal cases, will never be denied: It is a right recognised by all the courts in England. Some instances have happened, where a new trial has been granted after a verdict of guilty, but there has been no instance where a new trial has been granted after a verdict of acquittal. The reason given for the restriction of the counsel is, that it saved time. How was this to be done? By preventing the reading of those authorities which the counsel deemed material to the defence of their client.

The third specification is, "that the judge debarred the prisoner of his constitutional right of addressing the jury (through his counsel) on the law as well as on the fact, and endeavoring to wrest from the jury, their indisputable right to hear argument and determine upon the question of law as well as the question of fact, involved in the verdict they were required to give." It is not contended that Mr. Chase debarred the counsel by any actual interference when they were about to address the jury, but that his conduct on the first day had that tendency. Mr. Lewis stated that the judge did say, that if the counsel conceived the opinion of the court to be erroneous, they must address their arguments to the court and not to the jury. And on the second day, when judge Chase told the counsel that they were at liberty to proceed and address the jury on the law, he added, that they must do it at the hazard of their reputation, and this was done in the presence of the jury. No doubt can exist but that the counsel were prevented from addressing the jury by the conduct of the judge, and no counsel would address a jury under similar circumstances. Mr. Lewis might well use the language which he did, and was perfectly justifiable in abandoning the cause of his client, because, after what had taken place, there was no hopes of rendering him any assistance by defending him, and the only chance of saving his life was to obtain a pardon from the president. It was said by one of the counsel, that the right of the jury to decide on the law, did not give them a dispensing power over it, and they were bound by the opinion of the court, if that opinion was correct. There can be no doubt of this. Neither the court nor jury have any right to dispense with the law. The counsel for Fries, did not contend that the jury had

this power. All they contended for was, that the jury should receive information upon the law. It has been asked what inducement a judge can have to act corruptly in this country, when they are independent. Sir, in England, the judiciary are as independent as in this country; it has been sacred for nearly one hundred years, and yet for the last twenty years, many instances have been pointed out, in which we find a strong leaning of the court against the prisoner. In Ireland, judicial independence is strongly fortified. What has been the conduct of judges in that country? We have seen Ireland bleeding at every pore, and trembling at every nerve. We see the judges there, always engaged on the side of the prosecution. Those judges might expect and receive the approbation of their government for such conduct, and that would be inducement for others to follow their example. It is our duty to prevent this evil from growing in this country. Let us crush it in the bud, lest we be unable when it becomes a tree. I trust that this court will be of opinion, that judge Chase has been guilty of a misdemeanor in office, and that he will be convicted, and disqualified from holding any office under the United States.

I do not intend to make any observations on the rest of the articles of impeachment, but shall leave it to my two friends who are to follow me. I have in this important business been governed by a sense of duty, and I trust that this honorable court will be governed in the like manner.

Mr. RODNEY.

Mr. President. A spectacle as solemn as any heretofore witnessed now presents itself to our view. A man who has filled many of the most important public stations in our country, stands charged with the commission of criminal acts. On the one hand the reputation and character of a respectable individual is involved, on the other the most important privileges of the American people. A man who can behold this scene with indifference must be unworthy of society. The public anxiety must be manifest on so important a trial. It is a trial embracing a number of transactions, and is more important than any which has transpired since the formation of our government. In acting as a manager of the house of representatives in support of the impeachment, I shall discharge my duty with extreme pain, but it has been a rule of my life never to suffer my private feelings to prevent me from discharging my duty. To this tribunal I look for a display of impartiality in this case, and I feel confident that this honorable court will suffer neither party nor personal considerations to mingle themselves in this cause. The baneful spirit of party will not dare to approach these walls. In the whole proceedings of this trial, I have discovered that truth, and truth only, has been regarded, and after a fair and full investigation of the case, I shall acquiesce with chearfulness in the decision. In the course of my arguments, permit me to advert to some of the positions laid down by the learned counsel for the respondent. This court has been reminded that their judgment will be judged by posterity, and the respondent in his answer has gone farther, and appealed to the great searcher of hearts at the last day. Before this tribunal we all must appear, and I trust that more mercy will be shewn to the respondent, than was shewn by him to Fries. We have heard something like a complaint from my learned friend who opened the defence, that this impeachment had not been instituted sooner. Let it be remembered that although some of the acts with which the judge stands impeached, were committed several years ago, yet that others were committed but a short time since, and the impeachment was not instituted until found absolutely necessary. Was then the leniency of the house of representatives a ground of reproach? I trust not. Although justice has a slow yet it has a certain step, and will always overtake her victims: And the house of representatives far from being deserving of censure for this prosecution, ought to receive credit for the pains which they have taken, to preserve the fountains of justice pure and unsullied: and the thanks of the nation are justly due to my worthy friend near me (Mr. Randolph) for his bringing forward the investigation. We have heard some

observations with respect to the independency of the judiciary. I admit it to be essential, but I am afraid that the doctrine is attempted to be carried too far. We have been told that the only reply which could be made to the essentiality of the independence of the judiciary was some jargon about the sovereignty of the people. Sir, I cannot agree with my friend (Mr. Hopkinson) that the people are to care nothing about the actions of their agents, on the contrary, I believe they ought always to watch them. An observation was made by the gentleman who spoke yesterday (Mr. Harper) with respect to the change of parties. If the observation was made with reference to those in power, I do not conceive it to be correct. We have found the present ruling party unwilling to continue laws under which some of them while in the minority had been punished, and they are now attempting to preserve the streams of justice pure, by bringing before this bar a judge, who has been charged with oppression in office. It was contended by the attorney general of Maryland, that according to the authorities, no person could be impeached but for a high crime or a high misdemeanor, and that it must be such an offence as stamped infamy upon the officer. Let us without troubling the law books, advert to the constitution of our country. I think I shall be able to demonstrate from the language of that instrument, that it is not necessary that a judge should be guilty of an indictable offence to render him impeachable, and I will go farther and shew that according to the gentleman's (Mr. Martin) own definition, and taking up the book which he has cited, that the respondent has been guilty of more than one misdemeanor.

The first mention which is made in the constitution about impeachment is in the third section of the first article, where it is said, that "the senate shall have the sole power to try all impeachments." In the next clause we find the punishment in cases of impeachment limitted; it declares, that "judgment in cases of impeachment, shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law." Upon the basis of this last article, a superstructure has been erected by the counsel, which I trust can easily be demolished. It is contended that the framers of the constitution were of opinion, that to render an offence impeachable, it must be indictable. Can this meaning be gathered from the words of the constitution? To my mind it can not. In England the punishment in cases of impeachment supercedes all other modes, and a man can not be indicted after being impeached. But the framers of the constitution, having limitted the punishment in cases of impeachment, also enacted that the party might be afterwards indicted and punished, according to law, meaning where an indictment would lie, leaving therefore nothing to the discretion of the court of impeachment as to the annexing any other punishment to removal and disqualification. It was therefore absolutely necessary that a clause should be inserted in the constitution, providing that the party might "be indicted and punished according to law," because crimes might be committed by an officer of government, for which removal and disqualification would be a very inadequate punishment. Let us proceed a little further on the constitution. In the fourth section of the second article, it is said, "the president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." Here the constitution is imperative, and the officer must be removed upon conviction of either of those offences. If we take the constitution as one entire instrument, the system of impeachment will be found as little liable to objection as any other part of it. The constitution also declares, that "the judges both of the supreme and inferior

courts, ſhall hold their offices during good behaviour." Judge Chaſe holds a high and reſponſible office, and is charged with acts of miſbehaviour in office. Any act of miſbehaviour is a breach of duty, and a judge cannot be removed from office but by impeachment. Were the people to take notice of the acts of miſbehaviour? If ſo, to whom are they to complain? It muſt be to the houſe of repreſentatives, who muſt exhibit the articles of accuſation to the ſenate, who will judge whether they amount to a miſbehaviour in office. If the poſition taken by the counſel for the reſpondent be correct, in what a ſituation would this country be. No miſbehaviour in office would render an officer liable to impeachment and removal, unleſs the offence were indictable. Suppoſe judge Chaſe had omitted to hold his court, and buſineſs had thereby been prevented from being tranſacted; that would have been no indictable offence, yet ſurely it would be ſuch a groſs miſbehaviour in office as to render him unfit to hold his ſeat on the bench. He muſt therefore be impeached for ſuch conduct. Suppoſe he ſhould from favor, poſtpone a cauſe for one perſon and refuſe to poſtpone the cauſe of another in a ſimilar ſituation. Surely for ſuch a miſbehaviour he would deſerve to be removed, but he could not be removed unleſs by impeachment, for the offence is not indictable. Habitual drunkenneſs in a judge is not an indictable offence, but the ſenate at their laſt ſeſſion, determined it to be an impeachable one, and did actually remove judge Pickering from office for that offence. Suppoſe a judge ſhould order a trial by eleven jurors inſtead of twelve, I know of no law which would be violated, and I defy the learned attorney-general of Maryland to ſhew any law which provides that there ſhall be twelve jurors to try a cauſe, yet this would be an act of groſs miſconduct, and deſerving of removal. I will again refer to the precedent which I mentioned a few days ago. I allude to the caſe of judge Addiſon. But a gentleman (Mr. Martin) has endeavored to impeach the authority of the higheſt tribunal in Pennſylvania, and has aſked if that deciſion is to be a precedent for this court. I aſk ſir, whether, when a caſe which was decided in Connecticut has been cited, the deciſion of the ſenate of Pennſylvania ought not to be attended to? Surely a caſe decided in Pennſylvania, ought to have as much weight as a caſe decided in Connecticut. What were the charges againſt judge Addiſon. There were two articles of impeachment. The firſt charged him with having told the petit jury (after judge Lucas had charged them) that what that judge had ſaid, had nothing to do with the ſubject; and the ſecond charged him with preventing judge Lucas from delivering a charge to the grand jury. (Here Mr. Rodney read the articles.) The counſel for the proſecution relied chiefly on the laſt article, and in the courſe of the trial it appeared from the evidence, that Mr. Addiſon, as chief juſtice, always delivered charges to the grand juries, and that after having delivered a charge, he prevented Mr. Lucas, who was an aſſociate juſtice, from delivering one. It was contended by Mr. Addiſon with great ingenuity, that he was not liable to an impeachment, becauſe there was no violation of law; he argued this with great zeal, and there was but little doubt of there being no law to puniſh him, becauſe an information had been attempted to be filed againſt him, in the ſupreme court of the ſtate, and the court had refuſed to grant it. No law can be found which gives the power to the aſſociate judges to deliver charges, and it had been a ſettled opinion among the judges of that court, that Mr. Addiſon alone had the right to deliver charges to grand juries. It was the wiſh of judge Addiſon, not to have his political charges contradicted. Had he not delivered *extra matter*, he would never have had to interrupt Mr. Lucas. This is one of the ſtrongeſt caſes which human imagination can

invent, in ſupport of the doctrine for which I have been contending. The counſel for the proſecution did not attempt to ſhew that it was an indictable offence, yet notwithſtanding this, judge Addiſon was convicted and removed from office. There is alſo a manner provided by the conſtitution of Pennſylvania, for removing all officers not guilty of impeachable offences, and this was relied on by Mr. Addiſon, but the ſenate conceived it was ſuch a miſbehavior in office, as juſtified a conviction and removal, and I think they decided very properly. As I have been called upon to relate a recent caſe decided in Pennſylvania, I will obſerve, that although the judges in that caſe were defended by two of the moſt able counſel in the United States, and the offence was not contended to be indictable, yet they never made the point that the judges were not impeachable, becauſe not indictable. They contended that the offence was an error in judgment, and that judges were not liable to impeachment for ſuch an error. But I rely principally on the caſe of judge Pickering, which was decided by this honorable court, and which clearly eſtabliſhes the doctrine, that it is not neceſſary that an offence ſhould be indictable in order to render it impeachable. What is the definition of a miſdemeanor? It is an offence of omiſſion or commiſſion; either doing what is prohibited or neglecting to do what is commanded. I will try this caſe by that teſt. If we ſhall ſhew to this court, that by the conſtitution a man is entitled to a fair trial and the benefit of counſel, and that Fries and Callender were deprived of thoſe rights, I truſt there will be no heſitation in declaring that the reſpondent has been guilty of high miſdemeanors in office. What is the oath of a judge? It is to adminiſter juſtice faithfully and impartially. The conſtitution is the ſupreme law of the land, and if judge Chaſe deprived Fries of a fair and impartial trial and of the benefit of counſel, he has committed an act in the very teeth and face of that ſacred law. This is a miſdemeanor of the higheſt nature, it is a violation of the ſupreme law. If in a capital caſe the reſpondent deprived the accuſed of the benefit of counſel, he has been guilty of a violation of the conſtitution in one of its moſt important parts. I hope Mr. Preſident, I have ſatisfied the court that the offence need not be an indictable one to render it impeachable, and that if judge Chaſe is guilty of the charges contained in the impeachment, he has committed high miſdemeanors and is liable to a removal. In examining ſome of the articles of impeachment, I ſhall occupy as little of the time of the court as I poſſibly can. I conſider myſelf addreſſing judges more competent to give me inſtruction than to receive it from me. Let me now proceed to the caſe of the poor, trembling unfortunate Fries, which is a lamentable ſpectacle, and as it regards the reſpondent, it is of the firſt importance. Fries had been indicted, tried and convicted of having been guilty of treaſon, and a new trial granted. This was a re-hearing of the caſe, and nothing was to be inferred from the former deciſion. I apprehend that it was the duty of judge Chaſe to have gone into Pennſylvania, with a mind totally unprejudiced, and have viewed every circumſtance of the caſe with the utmoſt impartiality. It was not his duty to have formed his opinion on ex-parte teſtimony; his mind ought to have been free to receive the impreſſions of truth, and to decide according to the principles of juſtice. What was the benefit of a new trial, if the judge was to go to hold the court with a mind prejudiced againſt the priſoner. But we are informed by judge Chaſe in his anſwer, that he went to Philadelphia to hold the court and had heard the indictment againſt Fries, read upon his arraignment. I will recur to the teſtimony which has been offered in this caſe, where there is an admiſſion by the reſpondent, that the opinion which he had reduced to writing was to be delivered to the jury after the attorney for the United States had opened his caſe, thereby adding his ſanction to the ſtatement made by

the profecutor to the jury. In the opinion which judge Chafe, had reduced to writing, he fays, " the court heard the indictment read upon the arraignment of the prifoner, and juft now on his trial." Here the judge was premature, for at the time when he delivered a copy of the opinion to Mr. Lewis, Fries had not been put on his trial. This proves the firft fpecification in the article relative to Fries to be correct. What would judge Chafe have thought had this court acted in a fimilar manner? Suppofe at the opening of this cafe, the prefident of the court had delivered a written opinion on the law, and declared that the court had maturely confidered the law, and that was the refult of their deliberations, and that the counfel for the refpondent fhould not recur to any authorities but what the court deemed relevant. I apprehend that judge Chafe would not have confidered this a fair and impartial trial. He would have exclaimed (and with juftice too) that his cafe was prejudged; that there was a determination to convict him. But we have been told that judge Chafe when he delivered the opinion declared that "counfel fhould be heard." What was this hearing? In order to afcertain the meaning of the judge we muft bear in mind the teftimony. This circumftance is related differently by the witneffes. It is true that Mr. Tilghman ftated that judge Chafe did obferve, when he faid that the court had formed an opinion on the law, " that nevertheleſs, counfel fhould be heard." But we find that when the learned judge explained his meaning, it was that they fhould be heard in the manner pointed out by him. They were not to be permitted to cite cafes to the jury which he confidered not law. Mr. Rawle ftated that he took no notes on the firft day of the trial, and has but an imperfect recollection of what tranfpired; on the fecond day he fays that judge Chafe informed the counfel that they might proceed in the defence and argue the law to the jury, but that they fhould not cite the cafes of the " ftags horns," and the " heir to the crown." It feems to be the unfortunate fituation of the judge, to have his expreffions always at variance. After telling Mr. Lewis to proceed and argue the law to the jury as fully as he chofe, he obferved when fpeaking of cafes on which Mr. Lewis meant to rely, " fuch cafes ought not, fhall not go to the jury." I muft be permitted to remark that the jury have a right to decide the law as well as the fact in criminal cafes, and the court have no right to decide what cafes are or are not law. If the court are to decide what cafes are law, the right of the jury to decide the law would be a mere name. It would be fomething fimilar to the failor in the play of the "Tempeft," who was content that his comrade fhould be viceroy over the iſland, provided he fhould be viceroy over him. I do not mean to fay that if counfel were to cite hiftory to the jury as law, that the court would not have a control over them and prevent their waſting time, by reading books totally irrelevant. But the cafes which the counfel for Fries were prohibited from citing, were relevant. The conftitution declares that treafon fhall conſiſt " in levying war." The terms " levying war," are conſtructive.

When the counfel for Fries knew that the counfel for the United States would cite cafes decided in England fince the revolution to fhew what was deemed a " levying war" they wifhed to cite cafes before the revolution, in order to fhew that every thing almoft had been deemed treafon, and that the judges fince the revolution had confidered themfelves bound by decifions before that period. Was there any thing incorrect or improper in this? Was it not right when the counfel for the United States were permitted to cite cafes as law, for the counfel to fhew the muddy and corrupt fource from which the decifions flowed? Had they not a right to fhew that fome of them were made by the infamous Jeffries, and that although the judges in England fince their revolution were independent, yet they confidered themfelves bound by thofe decifions, and

that the courts of the United States ought not to be governed by them? I conſider that this act of the reſpondent deprived John Fries of the benefit of counſel. In ſupport of this we have the teſtimony of Mr. Lewis and Mr. Dallas, who declare, that judge Chaſe ſaid that the counſel muſt addreſs themſelves on the law to the court and not to the jury. To be ſure Mr. Tilghman and Mr. Rawle do not recollect this, but how is this to operate againſt the poſitive teſtimony of the other witneſſes. I will put a caſe, which will ſhew that ſome ſtriking obſervations may be recollected by one witneſs, and not by another. The gentleman who cloſed the defence, (Mr. Harper) mentioned, that one of the managers had ſaid, that an "impeachment was merely an inqueſt of office." I believe there is not a manager who recollects that the obſervation was made (except the gentleman who made it) and yet I believe there is not one manager, who does not believe that it was made. We have alſo the poſitive teſtimony of Mr. Lewis and Mr. Dallas, that judge Chaſe prohibitted the ſtatutes of the United States from being read. The counſel finding that upon the firſt trial of Fries, the caſe was aſſimilated to the caſe of the Weſtern Inſurrection, wiſhed to read the ſtatutes of congreſs, in order to ſhew their opinion of thoſe caſes, and that congreſs deemed an offence ſimilar to the one with which Fries was charged, not treaſon but a riot It was believed that by the firſt ſection of the "ſedition law," the crime with which Fries ſtood charged was puniſhed by "fine and impriſonment." We have been told that thoſe ſtatutes ought not to have been read to the jury, becauſe the conſtitution has defined treaſon, and congreſs had no power to ſay what was or was not treaſon. It is true that the conſtitution has defined treaſon, but the legiſlature of the United States have an indiſputable right to give their conſtruction to the terms 'levying war.'

The judge himſelf ſtated, that Engliſh authorities ſince their revolution, ſhould be read to the jury, not to govern their deciſion, but merely as the opinions of wiſe and able men. Yet the opinion of congreſs was ſcouted out of court. I did not ſuppoſe that there was a court of juſtice or injuſtice in this country, that would refuſe to hear the opinion of the legiſlature on ſo important a ſubject. Take it for granted, that congreſs could not define treaſon, yet ſurely the courts ought to have reſpected the opinions of ſuch an an enlightened body. Was there no gentlemen of talents in congreſs at the time of the paſſage of the law? Surely that will not be contended. But why did the counſel wiſh to read the ſtatutes of congreſs? It was to ſhew that the opinion formed by judge Chaſe was incorrect. We all know that opinion (like the one given by the judges) without argument, is not binding, and that an opinion given after argument, which has no relation to the ſubject are mere *Obiter Dicta*, and are but little regarded. The counſel therefore wiſhed to ſhew to the jury that the opinion formed by the court without hearing argument was erroneous, and they were deprived of this right by the court. Here then are two charges proved upon the reſpondent, "that he delivered an opinion in writing on the queſtion of law before counſel were heard, and that he reſtricted the counſel from citing authorities which they deemed neceſſary in the defence of their client." Here then the priſoner was deprived of conſtitutional privileges. Here we find him deprived of addreſſing the jury on the law, and his counſel compelled to abandon his caſe by the conduct of the reſpondent. In what view does this exhibit a man, who is calculated to be one of the greateſt men that our country can boaſt of? In exhibit, a ſcene truly deplorable, and yet we are told that he ought to have committed the counſel to priſon for reſiſting ſuch innovations on their privileges? What, ſir, commit counſel to priſon for attempting to addreſs the jury on the law in a criminal caſe, when there was no diſpute about the facts, and withdrawing from his defence when they were not permitted to ſay any thing in his favor, becauſe, by

the conduct of the court, they were compelled to abandon the defence of their client; were counsel of their character to be committed for not tamely surrendering their rights? So far from agreeing with the learned attorney general of Maryland on this, I am of opinion that the counsel were worthy of a civic crown for their manly conduct. I was sorry to hear that in Maryland, in a criminal case, nothing is more customary than to take the opinion of the court on the point of law, and for the counsel to acquiesce in their decision; that although counsel believed the opinion of the court to be erroneous, yet that it would be deemed a breach of decorum to argue to the jury against the opinion of the court, and therefore they must sit down and see their client convicted. When however I put a case to the witness (judge Winchester) of gross and manifest error in the opinion of the court, whether he would not then argue the law to the jury, he replied that such a case would justify it. It has been stated that the opinion of the court in the case of Fries was correct, and that similar cases had been decided in the same court. I am not disposed to enter into an investigation of the law of treason, but I only mean to enter my solemn protest against the opinion of the respondent on the law of treason. I believe that John Fries was not guilty of treason, and that he was deprived of a constitutional privilege when his counsel were prevented from arguing the law to the jury. I do believe that Fries was pardoned because the then president of the United States, did believe the opinion of the court to have been erroneous. But for the interference of the president, the blood of Fries would have been shed, and that the respondent would have had to answer for it at the judgment seat to which he has appealed. The pardon was granted in consequence of the representation made to the president by the counsel for Fries, and if ever the arm of mercy ought to have been extended to any person condemned to die, it was extended properly in the case of Fries, and the late president is justly entitled to the eulogium which has been bestowed on him by my friend who opened this case, (Mr. Randolph.) When Fries was deserted by his counsel, judge Chase asked him whether he was ready for trial or would have other counsel assigned him. What must have been the state of Fries's mind at that time? Without counsel to advise him what to do, and being arraigned for an offence which might deprive him of his life; he was far from being in a proper state of mind to conduct his cause, and yet they were told that it was the fault of his counsel, who withdrew from his defence, and this is made a ground for acquiting the judge, although he forced them to abandon the defence. While I am upon this part of the subject, permit me to take notice of some cases cited by the counsel. The gentleman who opened the defence, referred us to a case in Kelynge, where the judges met and decided what was to be the law in the trial of persons, who were charged with having committed treason. This took place after the restoration of Charles the second, and the persons who were to be tried where charged with the murder of his father. Need I inform this honorable court, that at that time the island of Great Britain was a place of common slaughter. That judges were appointed to bring to punishment the innocent as well as the guilty. Such was the thirst of the government for blood, that they persecuted persons who had fled to the remotest corners of the earth, and it is surprising that a case which had been determined at a time when proscription was the order of the day, should be produced to justify the conduct of the respondent. One of the counsel, (Mr. Key) cited a late case from Term Reports to shew, that however manifestly a judge violates the laws of his country, yet, that criminal intentions must not be presumed. That case was an application for an information, which is a summary process and has no analogy to the case at bar. But it appears that in that case the court did not decide the law until they heard

the evidence, and the opinion given by judge Bullen, that corrupt motives muſt be proved in a judge, was an opinion which it was not neceſſary for him to give in the deciſion of the caſe, and was a mere *Obitu Dictum*. The reſpondent in the caſe of Fries, decided without hearing one of the parties, and however clear his perception of the law might be, yet moſt indubitably his conduct was incorrect, let him be tried by any ſtandard. Even omniſcience would not condemn Adam after he had trangreſſed, without a hearing, for we read in that ſacred book which has been ſo much appealed to, that the almighty cried "Adam, where art thou." And ſhall man, proud man, puffed up with a little brief and fleeting authority," play ſuch fantaſtic tricks without receiving puniſhment from the conſtitutional organ of the people? I truſt not ſir.

The caſe of Fries was ſucceeded by that of Callender. Callender had written a book which I never ſaw until the commencement of this trial. It appears that the judge was furniſhed with a copy of the work, and with it ſcored, he uſed it as a *vade mecum*, or a travelling companion. With it he travelled to Richmond, where the book was printed, to hold a court, and ſoon after his arrival a preſentment and indictment were found againſt Callender. Mr. Callender was hunted up and down the country, was at length traced by the marſhal and brought into court.—He plead not guilty to the indictment, and had counſel for his defence. To avoid any difficulty on the caſe of Callender, I ſhall rely on the teſtimony of Mr. Robertſon the ſhort hand writer. An affidavit was filed by Callender for a continuance of the cauſe, and the judge refuſed to grant it. It has been ſaid that judge Chaſe offered to poſtpone the trial for ſix weeks. If I were to rely on any circumſtance to diſcover improper motives in the judge, it would be that. He was willing to poſtpone the caſe to any time, provided he ſhould preſide at the trial. Is it the common courſe of things when a poſtponment is prayed for, to grant it for a number of weeks? No, ſir, the poſtponment is granted until the next term, and I have never heard of a court's adjourning for a time and then returning to try a particular caſe. What was the pretext uſed by the judge for declaring that Callender was not entitled to a continuance? His conduct is to be teſted by the facts which appeared at the trial, not from Mr. Hay's declaring that there was no ground of defence, except the unconſtitutionality of the ſedition law.

There was an affidavit filed, ſtating grounds perfectly tenable, and on which the court ought to have granted a continuance. One of the counſel for the reſpondent (Mr. Lee) has read a rule of the ſupreme court, in which it is declared, that "that court will conſider the practice of the king's bench as forming the outline for them." In the caſe which I cited a few days ago, it is ſaid, that in order to obtain a poſtponment, it is only neceſſary for the party to ſwear that he has a materiall witneſs abſent, and that he believes he can be able to procure his attendance in a reaſonable time. The affidavit of Callender ſtated the abſence of witneſſes which he deemed material to his defence, and alſo ſtated the names of the witneſſes, and what he expected to prove by them. What is the anſwer given to this? The one is a technical objection as to the form of the affidavit. The other that the witneſſes if preſent could not acquit Callender, and therefore it was unneceſſary to continue his caſe. Never before in a court of juſtice did I hear that the teſtimony of a witneſs muſt prove the whole truth, or it was to be rejected. Was there any thing like ſuſpicion in the caſe of Callender which would induce the court to believe that the affidavit was merely filed for delay? I am unable to diſcover any thing of the kind. He was preſented, indicted and about to be tried at the ſame term.—Callender alſo ſtated in his affidat, that there were certain books which were material to his defence, and he wiſhed time in order to procure them. It has been ſaid that a man when he under-

takes to write, ought to be furniſhed with all his proofs. This is novel doctrine to me, that when a man is about to write, he muſt have his witneſſes at his elbow. When a man is charged with publiſhing a falſehood, it is ſufficient time for him to look out for his proofs. Suppoſe a man was told of a circumſtance, and from ſuch a reſpectable ſource as to leave no doubts of its authenticity. Nay ſuppoſe his informant went before a magiſtrate and depoſed as to the truth of it, muſt he not relate it becauſe his informant was not always in ſight.—Surely gentlemen are not ſerious in ſuch an obſervation, Callender was not bound to hunt for his proofs until he was preſented. Some of his witneſſes lived at a conſiderable diſtance from Richmond. He went into court, and ſtated that the witneſſes which he ſwore to be material, would go to defeat eight out of the twenty criminal acts charged in the indictment. What was the reply given to the affidavit? It was that the witneſſes if preſent, could not exculpate Callender. Did any of the members of this court ever hear of ſuch a flagrant piece of injuſtice? How were the court to know but that Callender had witneſſes at hand to prove the truth of the reſt of the charges? If in a court of criminal juſtice a man's caſe embraces a variety of facts, and one of the witneſſes who is material is abſent, the court ought not to enter into an inveſtigation of the other facts, but ought to poſtpone the cauſe until the attendance of the abſent witneſs. Was there ever a caſe, previous to Callender's, where the court undertook to enquire whether the preſence of the witneſſes would exculpate the party, before they decided upon the motion to poſtpone. If ſo, I never heard of it. One of the counſel (Mr. Key) obſerved that the affidavit did not ſtate that the witneſſes could be procured at the ſucceeding term, and that therefore it was informal. Callender ſtated the place where his witneſſes reſided, inſtead of ſwearing that he believed that they could be procured at the next term. He was more juſtly entitled to a poſtponment than if he had purſued the line chalked out by the gentleman (Mr. Key.) I refered a few days ago to a caſe in Cowper's Reports, where the perſon charged filed an affidavit ſtating the abſence of a witneſs who if preſent would prove a fact which gave a death wound to the indictment, and that the witneſs was out of the juriſdiction of the court.

Such was the humanity of the British courts, that the judge informed the proſecutor that unleſs he would conſent to take the depoſition of the witness, that they would poſtpone the cauſe for ever. And if judge Chaſe had conceived that the process of the court could not reach Callender's witneſſes, and that commiſſions could not be granted, yet would it not have been proper in him to have given him time to procure the voluntary attendance of his witneſſes? I am far from thinking that there may not be ſuch manifeſt violations of the law, as to prove that they were intentional. There may be facts enough to juſtify a tribunal in infering improper motives. I preſume that if a judge were to ſentence a man to be whipped for an aſſault and battery, that no tribunal would heſitate in declaring, that he acted through improper motives. I do apprehend that the refuſal of the judge to poſtpone the cauſe of Callender, was a manifeſt violation of all the principles of law, and that it was attended with ſuch circumſtances as renders it improbable, that it was a mere error in judgment. But let us purſue the conduct of the judge through the trial and ſee how he conducted himſelf. It ſeems that a juror was called to the book to be ſworn, who ſuggeſted to the court, facts, which made him an incompetent juror. I believe that a perſon ſituated as Mr. Baſſet was, was not a competent juror, and that Callender was tried by eleven jurors. It was ſtated by Mr. Robertſon, that when the firſt juror was called to be ſworn, that judge Chaſe put the following queſtion to him, which he declared to be the proper one: "Have you formed and delivered an opinion upon the charges in the indictment." I undertake to ſtate that it is a correct principle of law, that in all indictments for publiſhing a libel, that notwithſtanding the grand jury may have ſelected a particular ſet of words, yet that the petit jury have a right to examine the whole publication. I therefore apprehend that the queſtion wiſhed to be put by Mr. Hay, was a correct one, and went to the

git of the indictment. It is a principle of law which can not be disputed. In the case of the king against Stockdale, that it was determined that the jury had the right to examine the whole book, and the defendant was acquitted. And will it be contended that notwithstanding the jury might be of opinion that Callender was not guilty of a libel when the whole publication was taken together, yet that they should be tied down to the words charged in the indictment? Surely it will not. Mr. Hay's question then was a proper one, and the question put by the judge was improper. Callender might have been indicted for something on which the juror had formed and delivered an opinion, and yet as he had never heard the indictment read he must answer negatively to the question put by the judge. When therefore Mr. Basset was called to be sworn, he stated that he had doubts as to the propriety of his serving, for he had seen certain extracts which were said to be taken from the "Prospect," and that he had formed an unequivocal opinion, that it was a libellous publication. A nice distinction has been taken on this part of the case. It has been stated that Mr. Basset did not object to serving on the jury, but merely suggested the impressions on his mind. It is sufficient for my purpose that the court became acquainted with the facts, and I ask whether Basset was an impartial juror? I do not wish to resort to the British decisions. The constitution of the U. States is my text, it declares "that in all criminal prosecutions, the accused shall enjoy the benefit of a trial by an impartial jury," and the decision of the circuit court at the first trial of Fries, is a volume against all the authorities cited by the learned counsel for the respondent. What was that case? After a verdict of guilty, a motion for a new trial was made, on the ground that one of the jurors, after having been summoned, had expressed an opinion that Fries ought to be hanged. But what did the juror say when called upon? He declared that he had only said, that being an inhabitant of that part of Pennsylvania where the insurrection took place, he should not consider himself safe if Fries was not punished. In that case, Viner, Roll, Trials Per Pais and Brooke, were cited and much relied on, to prevent a new trial, and yet the court overruled these authorities and granted a new trial. Is there a member of this court who can for a moment believe that Basset was an impartial juror? His opinion was not only formed but delivered, and that too in the presence of the court, and against that opinion he could not give a verdict. His was a much stronger case than the one in the case of Fries, for Mr. Basset had formed and delivered an opinion that the publication was libellous. That certainly was giving an opinion that Callender ought to be punished. It is not similar to say that a man, guilty of a certain crime, ought to be punished, because Mr. Basset did in fact say, that Callender had been guilty of the crime. I do therefore believe, that judge Chase did decide against the principles of law and the letter and spirit of the constitution. After the counsel for the prosecution had gone through his testimony, the counsel for Callender, wished to examine colonel John Taylor, who was to prove the truth of a particular charge. When Mr. Taylor was called, judge Chase asked the counsel for Callender, what they intended to prove by their witness. This is a singular circumstance to me. I have never heard of such a question being asked by the court, but it always came from the opposite counsel. Upon their answering, the judge demanded a statement in writing, of the questions they intended to put. This is a novelty to me. But it has been said that the practice of this honorable court has been similar. There is an essential difference between the two cases. The practice of causing questions to be reduced to writing in so large a body as this, is universal and necessary. But none of the witnesses recollect a case where the court have demanded questions to be reduced to writing and submitted to their inspection. After the questions were reduced to writing and submitted to the inspection of judge Chase, he declared that the evidence of colonel Taylor was inadmissible. The judge said that no evidence could be received that did not prove the truth of the whole charge. It will be recollected that the twelfth charge contained two seperate and distinct sentences. The ground then was, that col. Taylor must prove both, or he proved nothing. We are ready to meet the judge on this point. Let me state the case. The counsel were endeavoring to prove the innocence of the party accused. They expected to prove something by the witness, and at the command of the judge reduced their questions to writing.

Colonel Taylor was to prove a particular fact, and because he was not acquainted with all that related to the subject, his testimony was rejected. Upon what principle this decision was made, I am at a loss to conjecture. Yet this point was made that a man's testimony must prove the whole case or it is incompetent, because it would render him no service. Would it not have been proper to let the testimony of Colonel Taylor go to the jury and see whether the counsel would call another witness to prove the truth of the other part of the charge? The judge was not to determine whether the counsel had other proof in reserve or not. The respondent must in this case have acted from improper motives. He cannot say that it was a mere error in judgment, for the law is too plain. Where would have been the difference, if Callender was able to prove the truth of all the charges by many or by one witness? If any exists it is in favor of many witnesses, for they would have fortified his defence much better than if proved by one witness. The chief justice stated that he never knew an instance similar to the rejection of Colonel Taylor's evidence, and in the volume of authorities cited by the learned attorney-general of Maryland, not a single case has been found bearing any resemblance to it. Upon this point therefore, judge Chase had no guide to lead him astray, and therefore must have been governed by improper motives. I shall leave the remainder of Callender's case to my friend from Virginia (Mr. Randolph) and shall proceed to consider the seventh article. Previous, however, to my entering upon the investigation of that article, permit me to remark on the *quo animo*, which governed the judge throughout the whole of these transactions. It is true, we have been charged with destroying the confidence of society. It has been said that the conversation which the judge had with Mr. Mason relative to Callender, ought not to have been given in evidence, because it was jocular. The respondent at that time was a judge of the land and was about to go to the state of Virginia, to hold a court where Callender resided. He had then a copy of the work which Callender had published, at that time he uttered the expressions mentioned by Mr. Mason, which were indicative of an intention to have Callender punished. If we pursue him in his way to Richmond, we find him in the stage asking a stranger whether he had ever seen the "Prospect Before Us," and expressing a wish that Callender had been hanged. He proceeded to Richmond with the book, it was delivered to the jury and Callender was punished; whatever the judge and his counsel might have thought of those circumstances, I believe Callender did not consider them as jests. I will not dwell longer on these circumstances, but will leave them to the court. It is in evidence that when judge Chase went to Delaware to hold the court, that he travelled from Wilmington to New Castle in company with Doctor M'Mahon who was a grand juror, and the man who gave him the information relative to the seditious Printer, and yet notwithstanding he was in possession of all the facts relative to the seditious temper of the Printer, the grand jury returned without any presentments or bills of indictment. It was the duty of that body to present all acts of criminality, and when they declared that none had been committed, they ought to have been discharged. When, however, they returned into court, and declared that they had found no presentments or bills of indictment, the passion of judge Chase burnt into a flame. When he found that the grand juror, who had given him information respecting a seditious Printer, had returned without having that Printer presented, he could no longer hold his tongue. Notwithstanding that the grand jury were in possession of all the information which he had, yet he could not forbear reminding them of their duty. I know of no control which the court have over the grand jury, to oblige them to hunt for criminality. The grand jury after replying to the answer put to them by the clerk of the court, applied to be discharged. What was the reply of judge Chase, as proved by the testimony of Mr. Read and Mr. Lee. That he had been informed that a highly seditious temper had manifested itself in the county of New Castle, and more especially in the town of Wilmington, where lived a most seditious Printer, unrestrained by every principle of virtue, and regardless of social order." The former of these words are denied by the judge. Why did not the judge bring

forward some of the grand jury as witnesses. Nay, why was not Mr. M'Mahon summoned. I do suppose that some of them would be more likely to recollect the expressions used by the judge, than those witnesses who have been summoned in his behalf. We have the positive testimony of Mr. Read and Mr. Lee, the one the district attorney and the other a member of the grand jury, and both men of fair character. Their official stations, bound them to recollect the expressions of the judge, because they were addressed to them. Against their positive testimony we have the negative testimony of Judge Bedford and several others who were in court and do not recollect to have heard those expressions. Judge Bedford was the only person in a situation to remember what took place. Mr. Vandyke was the attorney general of the state and no doubt was busily engaged. Mr. Hamilton was the son of the other marshal of the district and probably was assisting him and the other two witnesses were not in a situation to hear all that passed. Here then we have the positive testimony of two witnesses against the negative testimony of one. In the scale of character they stand equal and I believe the latter part of the conversation which is admitted to have taken place, justifies a belief that the former part took place also. Let us then take the expressions used by the judge as stated by Mr. Read, and which I have already stated, and I ask whether it was not language unworthy of a man who came to the state to hold the dignified station of the presiding judge of a court? He ought to have submitted to the grand jury and the district attorney whose business it was to present criminal offences, & not to stoop from the bench to persuade the grand jury to hunt up a criminal. The expressions concerning "a highly seditious temper manifesting itself in the state of Delaware" was highly unbecoming the character of a judge. What sir, was it proper in a judge who ought to be the counsel for the accused, to denounce a district of country as seditious and to name a particular person who was in his opinion deserving of prosecution? If this was not a gross misbehavior in office I am much mistaken as to what will constitute it. In the answer of the respondent, he admits what is proved by Mr. Lee, that he did mention the title of the paper which he had been informed was seditious. And held up as a criminal a person who had never been charged as such before; whom no magistrate had bound over, and a grand jury had refused to present. Judge Chase undertook to charge him as a libeller and a man deserving of punishment. This was certainly gross misbehavior in the Judge, and he ought to be punished. But we have been refered to a precedent from Pennsylvania, which took place under an able and upright Judge. It is the case where Judge M'Kean diverted the attention of the Grand Jury to a particular person who he considered had violated the law. But in that case the individual had been bound over to his good behavior, which is never done without strong grounds of suspicion. It is true that judge M'Kean went farther than any Judge I ever heard of except judge Chase, and I think that on the occasion mentioned he travelled out of the line of his duty. But it was the impulse of the moment, and is not to be compared with the conduct of judge Chase. The grand jury were furnished with a file of the printers papers, and the informer of judge Chase was among them, yet after a deliberate search there was nothing criminal found. Notwithstanding the printer had been up and censured by the judge as a violater of the laws, he was acquitted by the grand jury, and it therefore appears that the accusation was without foundation. I feel now very much fatigued from standing so long, and hope the court will adjourn.

Adjourned.

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Wednesday, February 27th 1805.

Mr. Rodney in continuation,

Mr. President.

After returning my thanks to the court for their indulgence shewn to me yesterday, I will resume the consideration of the Delaware article. It is a principle in every case, that a man is presumed innocent until proved guilty. The counsel for the respondent have admitted the correctness of principle, and wish it to govern in the case now before the court. But did the judge act in conformity to it in Delaware! He did undertake to denounce a person as guilty of a crime, before he was charged with the commission of any offence. This is proved by the

testimony of Mr. Read who stated that judge Chase observed that he had understood that a most seditious printer lived in Wilmington, unrestrained by any principle of virtue and regardless of social order. This part of his testimoney is corroborated by the testimony of judge Bedford, and the respondent himself admits that he mentioned the title of the paper. Did the judge allow the printer the benefit of those principles which his counsel now claim for him? No sir, he undertook to pronounce the man guilty without a hearing, and he surely travelled beyond the line of his duty. The judge observes in his answer that Callender before he undertook to libel Mr. Adams ought to have had his proofs, and when he undertook to denounce the printer in Delaware, he ought to have been in possession of such information as would justify him in what he did. How did the event justify him? After retiring to their room and searching the file of papers which the judge had caused to be procured, the grand jury could find nothing but a piece about judge Chase himself, and which the judge declared correctly, was not indictable in that court. I will proceed to make a few remarks on the last article. The impropriety of the conduct of the judge in this case, must have struck the mind of every member of the court. I believe all of them disapprove of political charges. It certainly has been the practice of the judges in the United States, to deliver political charges to grand juries, and to level their artillery upon the measures of the government. But is that to justify a judge in becoming a political preacher? It is indubitably of the utmost importance that courts of justice should be kept pure. Party spirit should never be suffered to enter their walls. Provided laws are administered with justice and impartiality to every person, we may always look up to courts of justice for protection. So long as the courts and juries remain pure and uncorrupted, we may be confident of safety, if innocent; but when judges undertake to evert those sacred places into political hustings, they must lose their respect in the eyes of the people, and business cannot be confided in them with confidence. Will not the juries adopt political prejudices and carry them home with them, and decide more from political parties than justice. Justice should be administered between man and man without any distinction, and this conduct of the respondent goes to prevent it. Although books have been produced, and a number of high authorities cited, to justify the delivery of political charges, I must be allowed to enter my protest against them; but no instance has been cited where a judge has, like the respondent, exclaimed against the acts of the government. When we look at the charge which has been offered in evidence by him, we find him censuring one of the most important acts of the government. I allude to the repeal of the judiciary system; in this he censured every branch of the government. I am not about to dispute the right of judge Chase in his individual capacity, to exercise his talents to prevent any measure from being adopted. But that right cannot apply to the case before the court. He cannot be justified in delivering from the bench, denunciations against both the measures of the United States and the state in which he held the court. Nor did he stop there. He went on to declaim against citizens of the state, for being in favor of measures which he deemed improper. Every member of this court must know that state jealousies still exist, and it ought to be the anxious care of every man, to say or do nothing calculated to excite jealousies between the United States and any individual state. Was it a part of the duty of the judge, to preach up against the acts of the legislature of Maryland? Assuredly not. He had no right to thunder anathemas against the measures of any state.

I have now gone through the articles of impeachment and will close my observations with one remark. From a view of the constitution, it must appear that this mode of prosecution was in-

ſtituted more to reſtore the purity of the office than to puniſh the officer. In this point of view I hope this court will conſider it, and by their deciſion will prevent the pure fountains of juſtice from being polluted by the hands of impure men. I truſt that they will ſay that the reſpondent is guilty as charged. An acquital will be a juſtification of his conduct, and will be a declaration that he acted with good behaviour. With a fervent wiſh that the Supreme Ruler of all things, will ſo govern the deciſion of this caſe that it may puniſh guilt and protect innocence; I cheerfully ſubmit the caſe to the conſideration of this honorable court.

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Wedneſday, February 27, 1805.

Mr. RANDOLPH,

Mr. Preſident,

AFTER a long and able, though I fear a tedious diſcuſſion of this ſubject, it again becomes my duty to addreſs you. I feel perfectly inadequate to the taſk of cloſing this important debate, on account of a ſevere indiſpoſition which I labor under, but I am aided by the ſtrong and deep intereſt which I take in the deciſion of this caſe. It is an intereſt which I am not aſhamed to avow. Strange would be my compoſition, if a proſecution inſtituted at my inſtigation, and conducted throughout by me, ſhould be a ſubject of difficulty or regret to me. While I ſhould have been much rejoiced at the acquittal of the judge, provided he had been found innocent, the next pleaſure which I feel is to bring the culprit who has violated the laws of his country, to ſignal and condign puniſhment. The able manner in which this proſecution has been ſupported by my worthy colleagues and right excellent friends, leaves me but a barren field to glean on. I will however attempt to preſent to the court as condenſed a view of the ſubject as I am capable of, endeavoring as much as poſſible to avoid the ground which my friends have trod. If guilty of a repetition of their arguments, I truſt I ſhall be pardoned, in conſequence of my being abſent during a part of the trial. Among the cauſes of regret which I experience from being forced by indiſpoſition to be abſent, the not being preſent when the eloquent gentleman who opened the defence (Mr. Hopkinſon) ſpoke is not the leaſt. I truſt in God, that merit will never be diſregarded, no matter in whoſe defence it is employed. Report ſpeaks loudly in his praiſe, and I am willing to credit report and to confirm it as far as lies in my power. In the firſt inſtance I muſt be permitted to ſay a few words on the doctrine of impeachment. I have heard ſome obſervations on that ſubject ſo inconſiſtent with reaſon, and ſo much at war with themſelves, that were I to paſs them over in ſilence, they would meet the fate which they merit. It has been contended, that a civil officer is not impeachable unleſs the offence be an indictable one. If this be correct, for what purpoſe was the trial by impeachment inſtituted?—The Conſtitution would have declared that all civil officers might be removed from office upon indictment.' This would have ſaved us all the trouble, anxiety and expence which is experienced in the trial of this caſe. In addition to the caſes cited by my worthy friend (Mr. Nicholſon) who ſpoke yeſterday, and whoſe arguments on this ſubject were unanſwerable, permit me to adduce a few other illuſtrations. The Preſident of the United States is veſted by the conſtitution with a qualified negative on all laws. Suppoſe he ſhould uſe this power in all queſtions, would it not be an abuſe of the power entruſted to him? It would certainly be a groſs abuſe of that power, which is entruſted to him to be exerciſed only on extraordinary occaſions, and under a high reſponſibility, and would render him liable to impeachment. The preſident has the power of keeping in his poſſeſſion all laws which are preſented to him for his ſignature, for ten days. Suppoſe at a ſeſſion ſimilar to

the preſent which muſt expire on the fourth of March, and at which the greater part of the laws are paſſed within the laſt ten days of the ſeſſion, he ſhould return the laws to congreſs on the third of March, within twenty minutes of its diſſolution, with his objections in writing to each of them? What would be the conſequence? The yeas and nays muſt be called on each queſtion in order to aſſertain, whether there was a conſtitutional majority, and before they could be taken the houſe of repreſentatives muſt be diſſolved, and the country left one year without the neceſſary laws. Is there a man in exiſtence who would not declare, that this was one of the moſt groſs abuſes of power an officer could be guilty of? and yet according to the doctrine of the counſel for the reſpondent, the preſident would not be liable to impeachment, and ſo long therefore as an officer keeps within the law, he may go to the tether of the conſtitution.—You, Mr. Preſident, in conjunction with the chief juſtice, the ſecretaries of ſtate and the treaſury, and the attorney general of the United States, as commiſſioners of the ſinking fund, have at your diſpoſal more than eight millions of dollars of the United States for the payment of their debt. Suppoſe you were to apply it to your own uſe? This would not be an indictable offence, and yet I truſt it would be an impeachable one.——But the learned counſel who cloſed the defence (Mr. Harper) knowing that this ground was trembling under his feet, and that the arguments of his colleagues could not be ſupported, has abandoned it, but has declared, that in order to ſupport an impeachment it muſt be an offence againſt ſome poſitive law. Here we agree. The caſes which I have put are offences againſt that law which orders perſons to exerciſe power with ſound diſcretion. It is a miſerable quibble to contend that the reſpondent is not impeachable becauſe there is no known law prohibiting what he has done. We contend that the oath of office of the reſpondent to execute his high judicial functions with impartiality and without reſpect to perſons, has been violated, and therefore he has violated the law which provides for taking the oath. And this poſition I will not ſurrender to our adverſaries. We charge the reſpondent with having been guilty of miſdemeanors in office; that he has behaved improperly and partially, and this the evidence proved beyond the poſſibility of a doubt. I ſhall now proceed to make a few remarks on the firſt article, and here I muſt reiterate my regret at not having heard the gentleman who opened the defence, and who confined his obſervations to this article, and whoſe argument I wiſhed much to have heard. I was however conſoled by the concluſive ſtatement of my friend who ſpoke yeſterday on this article (Mr. Nicholſon.) The obſervations of the counſel, which I have heard on this article, are at variance with themſelves and with each other. One gentleman (Mr. Martin) ſtated, that no offence was committed by the reſpondent, and referred to authorities in ſupport of his poſition.—The gentleman from South Carolina, (Mr. Harper) admitted, that an offence was committed, but that the reſpondent had a contrite heart and repented, and therefore this court ought in their mercy to forgive him.

Mr. Harper. The gentleman has entirely miſtaken me, I ſaid no ſuch thing. I ſaid that even ſuppoſing an offence to have been committed, the reſpondent made ample atonement for it, by his conduct on the ſecond day of the trial of Fries.

The Preſident. You had better ſuſpend your explanations until the gentleman finiſhes.

Mr. Randolph. The words which I took down and which were uſed by the gentleman, were theſe, "that the error in reducing his opinion to writing, was corrected, the paper withdrawn, and the counſel entreated to go on in their own way until the cup of humiliation was exhauſted to the

very dregs." This plainly evinces, that the court conceived (as well as the counsel) that they had acted improperly. It is not mercy which the respondent has demanded, nor is he entitled to it: he must have justice, and to use the expression of the gentleman not now in his seat, (Mr. Key) sheer justice. I will ask if the conduct of the respondent was correct on the first day, whence this recantation on the second day? Is any man fit to preside in a court of justice who by his conduct had been obliged to make atonement by prostrating and degrading his office at the feet of an advocate? Was that the character proper to dispense justice? I apprehend not. The man who is obliged to make atonement for his conduct, is not the man who is fit to preside in the tribunals of justice. I go farther. John Fries was either an innocent man and ought to have been acquitted, or he was a traitor to his country, and ought to have expiated on the gibbet the crime which he had committed. What then must have been the conduct of the respondent, which induced the executive to pardon a most notorious offender, and one to whom mercy ought not to have been bestowed, or to reduce an innocent man to the risk of death without a trial? I have understood that Fries has been represented by the gentleman who opened the defence, as not ignorant, friendless or innocent. Not ignorant or friendless said the gentleman, because he undertook to set up his opinion in opposition to that of congress, and was able to raise so many friends as to prevent the execution of a law. I am afraid that if this mode of reasoning were adopted, that the riotous mob under lord George Gordon, in 1780, would be considered as the most learned and enlightened men of the eighteenth century, for they even undertook to expound a doctrine which arose in the church, and which it was the peculiar province of the clergy to explain. If John Fries was innocent, then an innocent man has been condemned to death without a trial. If guilty, he was tried without even the forms of law, and the president was obliged to sign his pardon. I hope this court will not sanction such conduct. The conduct of the counsel for Fries, merits an abler eulogium than is in my power to make. My gratitude as an American citizen and a friend of liberty, will never cease to flow to them, for they stood up against arbitrary conduct and oppression.

The learned attorney general of Maryland observed, that he trusted that the hand of a lawyer might never be polluted by any thing worse than the opinion which Mr. Lewis refused to read. I hope that the hand of an advocate will always shrink from the touch of judicial influence and corruption. Let us now go to the case of Callender, and first with respect to the overruling the objections of Basset the juror. Here I must be permitted to observe that the law which has been adduced respecting jurors, has been drawn either from decisions in civil cases, or decisions in England before the revolution. From StarChamber decisions, passed in hard and unconstitutional times. These cases are now cited in support of the conduct of the respondent, although he would not suffer cases decided in England previous to the revolution, to be cited in favor of the innocent Fries. Were these decisions to have any influence in the decision of this case? I trust not sir. Not only Star Chamber decisions have been cited, but the authority of chief justice Keelynge. Who this Sir John Keelynge was, will appear from a reference to the 4th volume of Hatsel's precedents. We find in that book, that upon complaint being made of innovations in the right of trial by jury, that a committee was appointed to investigate the conduct of chief justice Keelynge. This then is the authority on which the counsel for the respondent rely for the vindication of their client. I do believe that the respondent (who has been declared to be a

patriot of seventy-six) will consent to be justified by such an example. I must believe sir, that the counsel for the respondent in their zeal to acquit him, have cited as law, what they knew not to be law. When I see gentlemen of their talents and legal knowledge, resorting to the authority of Keelynge, I think it a conclusive argument against their client, and a full refutation of the cases cited by the attorney general of Maryland. I must be obliged to solicit the indulgence of the court, for the imperfect view of the subject which I shall be compelled to take, as I have been so unfortunate as to mislay my notes, and shall I fear be unable to lay a correct statement of the voluminous body of report before this court. I shall now proceed to the case of Bassett. The counsel have told us that John Bassett, did not object to serving on the jury, but only suggested a scruple of delicacy which it was the duty of the judge to overrule. Whatever might have been the opinion of the judge, Mr. Bassett with all the strength of political prejudice which he so evidently manifested at this bar, did not think it perfectly correct and proper that he should serve on the jury. The respondent is charged with overruling the objection of Bassett to serve on the jury. What is an objection? A man comes forward and declares that he did not wish to serve on the jury, for certain reasons. This is not a positive denial to serve, but it certainly was an objection, and such an objection was overruled in the case of Callender; and to support this decision, we are refered to the authority of chief justice Keelynge, and Star Chamber authorities. This is the strongest argument against the conduct of the respondent. With respect to the rejection of col. Taylor's testimony, I shall bottom myself upon the admissions of the attorney general of Maryland, and his inability to find in all his legal researches, but one solitary case, which was deemed justificatory of the respondent, and that a late case in M'Nally, which is not the best authority. That authority declares that although the court possessed the right to oblige counsel to declare what they intended to prove by their witnesses, yet it was not the practice to do it. What was said by the chief justice of the United States, on whose testimony and that of Robertson's I rely? He said that he never knew a similar case to occur as the one in which the testimony of col. Taylor was rejected. He felt extreme pain in being obliged to speak of the conduct of a brother judge. The respondent was then the person who raised the question in the case of col. Taylor's testimony, which was novel in Virginia, and had never been witnessed by the chief justice, who is a man infinitely superior to the respondent in every point of view. Upon the subject of the first specification in the fourth article, the learned attorney general of Maryland, has cited M'Nally to shew that the court have a right to compel counsel to reduce their questions to writing; but in reply to this, I bottom myself upon the testimony of judge Marshall, who stated that where a question arose on the question itself, it was customary for the court to have it reduced to writing in order to decide with more accurateness, but that he had never known it done on any other occasion. This testimony establishes beyond a doubt, that judge Chase acted in a manner totally novel to the judges of the United States. On the subject of the manner which the judge conducted himself towards the counsel, I only wish to rely on the testimony of his own witnesses. While I do not wish to rely on the testimony of the counsel for Callender, I hope it will not be considered as meaning the smallest slight to them, God forbid, that I should say any thing which would in the smallest degree tend to invalidate their testimony, but they may be considered as parties concerned, and it may be said they were influenced by personal feelings; on this ground therefore, I do not mean to rely on their testimony. What did the chief justice say? He said but little, but what did

he look? He appeared to be conſcious that the reſpondent had acted improperly, but he felt the delicateneſs of his ſituation in deciding on the conduct of a brother judge. What did Robertſon ſay? That the judge always ſpoke in the firſt perſon. Col. Taylor declared that the conduct of the judge appeared calculated to abaſh the counſel and turn them into ridicule, and that it had the deſired effect, and that every body laughed at the obſervations of the court, but the counſel. What did Gooch ſay? Why, (to uſe his own phraſe) that the judge appeared much in "*yearneſt*," and that his remarks were very witty and abuſhed the counſel. But the attorney general of Maryland, who is never at a loſs for an argument, has obſerved, that this conduct of the judge was calculated to keep the people in a good humor—That the counſel for Callender attempted by their conduct to excite inſurrection, and it was proper in the judge to prevent their effecting their purpoſe. This argument does great credit to the ingenuity of the gentleman, but it does not juſtify the reſpondent.—— Where was the reſpondent at that time? Was he at a diſtrict remote from the ſeat of the government of a ſtate, and where he could not be protected? No, ſir, he was in Richmond, the capitol of a ſtate which was never diſgraced by an inſurrection, unleſs the glorious times of 1776 may be ſo termed. He was within a ſtones throw of the reſidence of the then governor of Virginia—a man whom I will ſay nothing about, let the high ſtations which he has filled in the ſervice of his country, ſpeak for him: a man who was at that time more intereſted in the ſafety of the reſpondent than he appeared to be himſelf: a man who trembled leſt the conduct of the reſpondent ſhould drive the people to madneſs, and cauſe them to violate the laws. The reſpondent was not merely under the protection of the laws of the United States, but he was in the neighborhood of a cantonment of the troops of the United States, who would have been ready to protect him, and ſuppreſs inſurrection. Why thoſe troops were brought to Richmond and kept there during the trial of Callender, is not for me to determine. But we have been told that the reſpondent is juſtified by the practice of his own ſtate, that he conformed to the practice of the ſtate of Maryland. Surely the practice of Maryland was not law more than that of Virginia, and not more to be regarded. The reſpondent in one inſtance reſts his defence on the ground that he was not bound by ſtate laws, and at the ſame time takes ſhelter under the laws and practice of the ſtate of Maryland. It has been aſked why the reſpondent did not conform to the character for diſcernment given him both by his friends and enemies. Why did he not if he wiſhed the conviction of Callender ſecretly lie in wait and ſpring upon his prey? Simply for this reaſon—that there is no principle or rule more true, than that whatever is the general character of a man, he is unable always to conform to it. We find the reſpondent in the caſe of Fries on the firſt day, highly imperious; but afterwards, on the ſtool of repentance.—At another tribunal this repentance may have ſome effect. But if this court will bear in mind that it was brought about by the manly conduct of the gentlemen of the bar, he will be entitled to no mercy before this tribunal for it.

It has been ſaid that the doctrine contended for by the counſel for Fries, and the counſel for Callender, would proſtrate our rights at the feet of juries. There may they always lie, in preference to the feet of judges.—The gentleman who cloſed the defence (Mr. Harper,) obſerved, that we ought not to place the criminal law at the feet of the juries. Sir, it is the moſt glorious attribute of juries to declare, that they have the right to decide the law as well as the fact in criminal caſes.

It is conceded they have the right to find a general verdict which cannot be ſet aſide, if in favor of the accuſed. Of what conſequence then is it, whether this power is an incidental or direct

one, ſo that they enjoy it? We have no power given by the conſtitution to puniſh a man for robbing the mail, but we have the power to eſtabliſh poſt-offices, and carries with it the power of puniſhing robberies of the mail. Gentlemen have admitted that the jury poſſeſs the power of deciding the law, yet they ſay they have not the right. In this tiſſue of ſelf contradictions the gentlemen tell us, that the jury ought to be bound by the opinion of the court as to the law, but they have a right to decide whether the facts proved, brought the caſe within the law. Is there a greater contradiction than this? Are gentlemen contending for a doctrine in a capital caſe, which in England has been ſcouted in the caſe of a libel, that the jury are only to find the facts and the court to determine the law?

In the caſe of Fries, it was perfectly uſeleſs to have a jury trial. The facts, which it is contended were the only thing on which the jury had a right to decide, were agreed on by all, and the court had decided the law of treaſon. I deny the gentlemen's law, as well verſed as they are in that ſcience; and I do aſſert, that if ever I am called upon to act in the capacity of a juror, I ſhall refuſe to be bound by it. Suppoſe a man were indicted for treaſon, the conſtitution has defined it, and the court aſſuming to themſelves the infallibility of the court of Rome, were to declare that a mere riot was "a levying of war;" ſhall I ſir, ſurrender my conſcience to the court? No, I ſhould be bound by my own belief, and ſhould diſregard the opinion of the court. Suppoſe a man ſhould be indicted for killing another. Some circumſtances will amount to a juſtification, ſuch as it being done in defence of his perſon, and which I conſider equally as ſacred, in defence of his character and reputation. If I were on the jury, and it appeared that the perſon indicted had killed the other in defence of his character and reputation, I will not find him guilty of murder, though directed by all the courts in the nation. According to ſome of the ſacred maxims recorded in that book which has been ſo frequently cited, I would ſay, "I would have done ſo too, and I cannot believe that to be a crime in another which would be juſtifiable in myſelf." I have been a juror, and always thought myſelf authoriſed to decide on the law in criminal caſes, and ſhould think I had as much right to dictate to the court what was the law in civil caſes, as they had to me in criminal caſes. I hope that before gentlemen will undertake to eſtabliſh the law as they have contended, they will introduce a bill to make juries more ſubmiſſive to the mandates of the courts.

There is an expreſſion in one of the articles of impeachment, which has been commented on by one of the counſel for the reſpondent, (Mr. Key:) It is the word "intemperance." As theſe articles came ſolely from my pen, I feel bound to explain the meaning of every word contained therein. The word intemperance, has various ſignifications and may proceed from various cauſes. It may proceed from gluttony. It may conſiſt in drunkeneſs or another exceſs which I am aſhamed to mention to this honorable court: or it may conſiſt in a want of temper. This laſt the article of impeachment has reference to, when it charges the reſpondent with being guilty of intemperance on the trial of Callender. This is a charge which the friends of the reſpondent are obliged to acknowledge to be correct. It is admitted that he wants temper.

Upon the ſubject of the eighth article I will take leave to ſay a few words. What was the charge given by the reſpondent to the grand jury at Baltimore? The eloquent gentleman who cloſed the defence, has compared the ſcene produced by it, to a brawl or a riot. He told us that there was no law to prohibit it, and the reſpondent was juſtifiable in delivering the charge

and yet the gentleman with ſo fertile an imagination as he poſſeſſes, could liken it to nothing but a brawl or a riot. And is this a proper character to preſide in a court of juſtice? Is a man who conducts himſelf in ſuch a manner as to excite in court, ſenſations ſimilar to thoſe excited by a brawl or a riot, to be continued in the exalted ſtation of a judge of the ſupreme court of the United States? I hope not, ſir. The time has been, when the ſentiments advanced by the judge in his charge, would have been denounced as jacobinical, and would have come within the pale of the ſedition law. Even-handed juſtice has come home to the reſpondent, his own precedents condemn him. The charge againſt John Fries, (and which the reſpondent pronounced to be treaſon) was an attempt to prejudice the minds of the people againſt the government, and the reſpondent has been guilty of the ſame offence. But this conduct has been attempted to be juſtified on the ground that it has been the practice for parſons to preach politics from the pulpit, and judges to pronounce judicial harangues from the bench. If we advert to Hatſell's Precedents, we ſhall perceive that doctor Manwaring was impeached for preaching a political ſermon. I truſt that the judiciary will be confined to their own province, that of giving correct expoſitions of the law, and that the quick hand of the government will puniſh all thoſe who exceed their proper bounds. If I thought it worth while, I would ſhew the impropriety of delivering political charges to grand juries, but that point muſt be evident, and has been conceded on all ſides. All the witneſſes produced by the reſpondent, have declared that they conſidered the delivery of political charges as improper.

I muſt now be permitted to attempt ſomething like a review of the conduct of the judge. Begin with him in May, 1800, when ſitting on the trial of Fries, he declared the law with reſpect to treaſon: Such treaſon as a man of plain ſenſe will not find, by adverting to the conſtitution. We next find him in the caſe of Callender, fixing the doctrine of libels. We ſee the ſame ſpirit pervade the deciſion of both theſe caſes, we ſee a determination to convict. Follow him to Annapolis, and we find the ſoul of Yorick infuſed in the ſoul of the judge. We find him not indeed the king's jeſter, for luckily we have no king; but we find him the jeſter of the nation, of the law, and of the judiciary. I beg leave here to remark upon the teſtimony of Mr. Maſon, with reſpect to the converſation which took place between him and the judge, at Annapolis. If this were a jeſt it was a bitter and biting one to Callender, and ſo far was the witneſs from conceiving it to be of that nature, that he never mentioned it to any perſon until the day preceeding this trial. He did not conceive himſelf juſtifiable to play with the character of the reſpondent, however the latter might be diſpoſed to ſport with that of others. But we were told that this ſort of evidence violated private feelings, and that one gentleman ought not to be forced to give evidence of the converſation of another. Thank God, we live in a country in which no man is above the law, and where no diſtinction is made in courts of juſtice between gentlemen and ſimplemen. Francis the firſt, did not carry his idea of gentlemen, further than has been done in this caſe. I have underſtood previous declarations of a party, is legal and proper evidence againſt him, eſpecially when his declarations are carried into effect. In this caſe the facts follow the declarations, God hath joined them together and let no man put them aſſunder.

We have been accuſed of laying in wait for the reſpondent, as he has done for his victims, and we have been told, in order to accompliſh his conviction

we have violated the feelings of gentlemen and loofened the bonds of fociety. Sir, in courts of juftice we hear nothing about gentlemen, and thofe remarks will not make us fhrink from our duty. We will follow him ftep by ftep unto the final confummation of his object. This conduct was unknown to the plain common fenfe of our anceftors. Follow the accufed from the trial of Fries to the cafe at New-Caftle, and we fee one uniform rule of conduct, a determination to bear down all oppofition. We are not to take the articles as different, but as one continual act of mifconduct. We find the charges fupporting each other from the cafe of Fries, in Philadelphia, to the charge delivered to the grand jury at Baltimore. We will then trace him from Annapolis as we would another felon, and fee if his after conduct was not in conformity with his declarations there. Trace him in the ftage on his way to Richmond, and we find him engaged in a converfation with Triplett, who was a ftranger to him, and expreffing fentiments hoftile to Callender. We find him afterwards at Richmond, expreffing his regret and apprehenfions that Callender would not be taken that court. But the gentleman who fpoke laft (Mr. Harper) obferved, that no credit ought to be given to this, becaufe the marfhal did not return without Callender. Triplett did not fay that the marfhal had returned without him, but that the judge told him fo. Might not the judge, hearing or fearing that Callender could not be taken, declare that the marfhal had returned without him? moft indubitably. There is no inconfiftency in the teftimony of Triplett, and not being contradicted it muft be confidered as concluftve. From thence follow him into court during the trial of Callender, and then trace him to New-Caftle and Baltimore, and we fhall find a tiffue of facts bearing up and fupporting each other. In Pennfylvania, we find conduct as was not novel to Lewis and Dallas; but Tilghman and even Rawle declared that they had never feen fuch a procedure. When I fay "even Rawle," I do not mean with difrefpect of that gentleman, but he did not hear what the others did. So little attention did he pay to the proceedings on the firft day, that he did not hear the expreffions of Mr. Lewis, which ought to immortalize him, "That his hand fhould never be polluted with a prejudicated opinion, efpecially in a capital cafe." He did not hear much elfe that was heard by others; the reafon was, that he was employed about his official duties. We fee the fame fpirit pervade the conduct of the refpondent. We have been told that our fympathy ought to be enlifted not on the fide of Fries, but on the fide of the judge. He has been repreferted as an aged patriot of feventy years, as a man who is obliged to employ the few moments in which he is not engaged in performing his judicial duties, in defending himfelf againft a criminal profecution, and it has been faid that we have thirfted for his blood. What, fir, are we about to take away his life? No, Mr. Prefident, we only afk that he fhould be removed from office, on account of the outrages which he has committed againft his country. But he is faid to be a man ftruggling with age and difeafe, a man worthy of fympathy. Sir, I muft be allowed to feel fympathy for others as well as the judge, and cannot refufe it to his victims. A hearty yeoman (as Fries was) ftruggling with injuftice and oppreffion, difpofing of his little property to meet the charges of the profecution. A yeoman, who, having heard of the ftamp act, in a moment of apprehenfion and violence of temper had refifted what he deemed an oppreffive law. This man we behold in a dungeon, liftening to the clanking of his own fetters, and without one folitary friend to comfort and cheer his drooping fpirits. He muft have been beloved and efteemed among his neighbors; for the gen-

tleman from Pennſylvania, (Mr. Hopkinſon) has ſaid that he poſſeſſed influence enough to prevent for a long time, the execution of a law of the United States. This man, trembling at the terrors of the law and about to be the victim of conſtructive treaſon, is as much entitled to our ſympathy as any king. He ſhall have my ſympathy, and more, he ſhall have juſtice. Sir, my ſympathy ſhall flow as much for the victim of injuſtice, as for his powerful oppreſſor. Let however the character which we have heard of Fries be falſe, and the other deſpicable, miſerable reptile, be as much a wretch as he has been repreſented to be, and which I grant to be correct, yet I truſt that this court will not be influenced by extraneous matter. We have been told that Fries was a great rebel, and Callender a miſerable wretch. Admit this to be the caſe, does that prove that they were not entitled to juſtice? The court was a court of law and not of honor, and were bound to diſpenſe juſtice to all with an impartial hand. I bottom myſelf on the caſe of Logwood, to ſhew that the chief juſtice of the United States, although he muſt have conſidered Logwood as one of the greateſt of criminals, yet he deemed him entitled to the benefit of a fair and impartial trial. Although there was great reaſon to ſuſpect his uſing foul play, that great man who preſided at the trial, and whoſe real worth was never known until he was appointed chief juſtice, ſaid not a word, uttered not a ſyllable until the jury had found their verdict and an exception was taken to the indictment, and he was obliged to deliver the opinion of the court. He never conſidered Logwood as entitled to indulgence. He knew that he had been guilty of a moſt heinous offence, and that he employed every undue means in his power to obtain an acquittal, but the judge ſhrunk from eſtabliſhing a precedent, which might be uſed when no neceſſity exiſted for it. This man had a fair trial, and Fries and Callender ought to have had the ſame, whether guilty or not. The attorney general of Maryland has told us that they had fair trials, becauſe they were guilty, and if the jury had found a contrary verdict it would not have been an impartial but a partial verdict, becauſe contrary to right. This is a different conception of an impartial trial than what I have always conceived. I hope the conduct of the judge will be taken altogether, and the *quo animo* will be ſeen to pervade all his acts. It has been aſked whether if the reſpondent (who is acknowledged to be a man eminent for his talents) had evil and corrupt intentions, he would not have diſguiſed them, or whether he would have diſcloſed them. In anſwer to this I will obſerve, that let a perſon be ever ſo wiſe, he is not always upon his guard. Men of ſenſe ſometimes ſay and do fooliſh things, like the lengthy argument of the ex-attorney general of the United States, to prove *that the Potomack had two ſides to it.*

In the deſultory courſe which I have purſued in the arguing of this caſe, I muſt be permitted to notice obſervations as they occur to me, becauſe I was unfortunate enough to loſe my notes, and they were only found and brought me this morning by the marſhal of the diſtrict of Columbia, but I have a precedent, for the learned attorney general of Maryland, was equally as deſultory as I have been.

The ex-attorney general of the United States, aſked whether it would not be abſurd that one ſet of laws ſhould be in force in the courts of the United States, on one ſide the Potomack, and a different ſet on the other ſide. Had the gentleman thought but a moment, he muſt have known that that was the caſe, and that the act of congreſs expreſsly declares the ſtate laws to be the rule of conduct for the government of the federal courts. What law of the United States provides for hanging a man for murder or treaſon, or provides for ſtriking a jury? None does exiſt.

No uniform laws exiſt throughout the courts of the United States, but they vary according to the cuſtoms and uſages of the ſtates. This was provided for the ſoundeſt reaſon; that the people of the different ſtates had been accuſtomed to be proceeded againſt by their own laws, and would like them better than a new code. I by no means deny the right of congreſs, to paſs a general law for the government of the federal courts, but by the law of congreſs it is declared, that the ſtate laws ſhall prevail. An attempt has been made in the courſe of the debate, to arraign the teſtimony of John Heath. How is it arraigned. He is a creditable man, has been a member of congreſs, and is now one of the executive counſel of the ſtate of Virginia. Marſhall ſtated, that when he went to the chambers of the judge, he found Heath on his way out, but he does not remember whether Randolph was with him at the time or not, Randolph might have been there before, and the converſation between him and the judge have taken place. Heath ſtated at this bar, that he related the converſation to Mr. Holmes and ſeveral others. An attempt has been made to ſhew, that he could not have related it to Mr. Holmes on that day, becauſe Holmes left Richmond before Callender was arreſted. Heath did not ſtate whether he related it to Mr. Holmes directly. He ſtated that he told it to ſeveral immediately, and that he remembers to have told it to Mr. Holmes; and the latter ſtates, that it might have been told to him at the September court following. Heath ſtated, that he had related the converſation to Merriwether Jones, who was ſummoned as a witneſs, but was prevented by indiſpoſition from attending, he would therefore have ſtated that as true which was not a fact, when he expected that Jones would be here as a witneſs. If I had been governed by perſonal conſiderations, I ſhould long ſince have cloſed my remarks, but my duty compelled me to be longer than I wiſhed. I ſhall however endeavor to finiſh, that this cauſe may go to a tribunal where it may be decided in the ſpirit and letter of juſtice. I feel averſe to detain this court any longer, when I am conſcious that buſineſs of importance claims their attention; but I muſt be permitted to repeat one argument, that the independence of the judiciary is amply ſufficient for the faithful diſcharge of their duties If judges are perfect, and not to be conſidered as men, why did the conſtitution provide for impeaching them? This court was told to guard againſt the ſpirit of party, and of the miſchief that would reſult from a conviction of the reſpondent; as the ſpirit of victorious factions have been adduced, I will ſay a few words. The preſent ruling party has been repreſented as a victorious one, and warned not to follow the example of others What is the ſubject of the proſecution? To hold up to the judges a warning, to act with uprightneſs in office, and not to lean to any party. If they do their duty and adminiſter juſtice to every perſon, they will be free from proſecution. This proſecution will be a ſolemn memento to them, that juſtice, although ſometimes ſlow, is always certain to overtake her victims. In the year 1800, when the reſpondent was ſitting on the trial of Fries, was it dreamt that in ſo ſhort a time he would be called to an account for his conduct? Certainly not. There was not the leaſt expectation of the great change which has taken place in our affairs. This is a clue to the key which unlocks the whole conduct of the reſpondent. He wiſhed to recommend himſelf to the preſident of the United States, and ſuppoſed that the conduct which he purſued, was moſt likely to have the deſired effect. It is well known that this country was divided by political parties, and that in the year eighteen hundred, the one to which the reſpondent belonged had the aſcendancy. The reſpondent then conceived that

able court, would admit of my correcting many other miſtakes of minor importance, into which the honorable gentleman has fallen; but the lateneſs of the hour, and our anxious wiſh to bring the trial to a cloſe, admoniſh me to abſtain from any further remarks.

Mr. Randolph. I hope the gentleman will have until to-morrow.

The Preſident. The gentleman has not aſked for time. If you wiſh to reply, you will pleaſe proceed.

Mr. Randolph. I did not ſay that the caſe cited from Keelynge was a Star Chamber deciſion, but that it took place in thoſe times when Star Chamber deſions were in force. I did not cite Hatſell to ſhew that chief juſtice Keelynge was convicted, merely to prove that an inveſtigation was made into his conduct on account of complaints having reached the houſe of commons, that the rights of jurors had been innovated by him. The gentleman cannot deny this, or it is immaterial whether he does or not, becauſe his denying it will not prevent it from being true. The event in the caſe of judge Keelynge ſhewed that the houſe had received erroneous information; but in the caſe before the court, I truſt the charges have been ſatisfactorily ſubſtantiated. If he is innocent, on us and on the houſe of repreſentatives be the diſgrace of having accuſed and brought him to this bar. As I before obſerved, let there be a unanimous vote of acquital; let hoſannas be ſung to his name; nay let odium reſt on the people of the United States.

On motion of Mr. Jackſon,

Reſolved, That this court will on Friday next, at twelve o'clock, pronounce judgment in the caſe of Samuel Chaſe, one of the aſſociate juſtices of the ſupreme court of the United States.

The court then adjourned.

HIGH COURT OF IMPEACHMENT.

FRIDAY, MARCH 1, 1805.

At half paſt 12 the court took their ſeats, and the preſident having directed the ſecretary to read the firſt article of impeachment, obſerved that the queſtion would be put to each member, on each article ſeparately, as his name occurred in alphabetical order. The firſt article was then read. When the queſtion was hereupon put by the preſident of the court, and repeated after each article as read, viz.

Is Samuel Chaſe, eſq. guilty or not guilty of a high crime or miſdemeanor in the article of impeachment juſt read and decided as follows:—

Article 1ſt.	guilty 16	not guilty 18
——— 2d.	10	24
——— 3d.	18	16
——— 4th.	18	16
——— 5th.	not guilty unanimous	
——— 6th.	4	30
——— 7th.	10	24
——— 8th.	19	15

The Preſident then ſaid, "*There not being a conſtitutional majority on any one article, it becomes my duty to pronounce that Samuel Chaſe, eſq. is acquitted on the articles of impeachment exhibited againſt him by the houſe of repreſentatives.*"

The court then adjourned ſine die.

☞ For the names of the members as they voted, ſee page 62 appendix.

APPENDIX.

IMPEACHMENT

OF

THE HON. SAMUEL CHASE,

WITH THE

ARTICLES

EXHIBITED AGAINST HIM

By the Houſe of Repreſentatives:

ALSO HIS

ANSWER AND PLEAS,

EXHIBITS,

AND THE

REPLICATION OF THE HOUSE OF REPRESENTATIVES,

&c. &c.

BALTIMORE:

PRINTED FOR SAMUEL BUTLER AND GEORGE KEATINGE.

1805.

ARTICLES

OF

IMPEACHMENT,

EXHIBITED BY THE

HOUSE OF REPRESENTATIVES,

AGAINST THE

Hon. Samuel Chase,

FOR

High Crimes and Misdemeanors.

Articles exhibited by the House of Representatives of the United States, in the name of themselves and of all the people of the United States, against SAMUEL CHASE, *one of the Associate Justices of the Supreme Court of the United States, in maintenance and support of their impeachment against him, for high crimes and misdemeanors.*

ARTICLE I.

THAT, unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them, "faithfully and impartially, and without respect to persons," the said Samuel Chase, on the trial of John Fries, charged with high treason, before the circuit court of the United States, held, for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May, one thousand eight hundred, whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive and unjust, viz:

1. In delivering an opinion, in writing, on the question of the law, on the construction of which the defence of the accused materially depended, tending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, before counsel had been heard in his defence;

2. In restricting the counsel for the said Fries from recurring to such English authorities as they believed opposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions, upon which they intended to rest the defence of their client;

3. In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt, or innocence, and at the same time endeavoring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give;

In consequence of which irregular con-

duct of the said Samuel Chase, as dangerous to our liberties, as it is novel to our laws and usages, the said John Fries was deprived of the right, secured to him by the 8th article amendatory of the constitution, and was condemned to death without having been heard, by counsel, in his defence to the disgrace of the character of the American bench, in manifest violation of law and justice, and in open contempt of the rights of juries, on which ultimately rest the liberty and safety of the American people.

ARTICLE II.

THAT, prompted by a similar spirit of persecution, and injustice, at a circuit court of the United States, held at Richmond, in the month of May, one thousand eight hundred, for the district of Virginia, whereat the said Samuel Chase presided, and before which a certain James Thompson Callender was arraigned for a libel on John Adams, then president of the United States, the said Samuel Chase, with intent to oppress, and procure the conviction of the said Callender, did over-rule the objections of John Basset, one of the jury, who wished to be excused from serving on the said trial because he had made up his mind as to the publication from which the words, charged to be libellous, in the indictment, were extracted; and the said Basset was accordingly sworn, and did serve on the jury, by whose verdict the prisoner was subsequently convicted.

ARTICLE III.

THAT, with intent to oppress and procure the conviction of the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted by the said Samuel Chase to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact.

ARTICLE IV.

THAT the conduct of the said Samuel Chase was marked, during the whole course of the said trial, by manifest injustice, partiality and intemperance, viz.

1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above named John Taylor, the witness.

2. In refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused; and although it was manifest, that, with the utmost diligence, the attendance of such witnesses could not have been procured, at that term.

3. In the use of unusual, rude, and contemptuous expressions towards the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend:

4. In repeated and vexatious interruptions of the said counsel, on the part of the said judge, which, at length, induced them to abandon their cause and their client, who was thereupon convicted and condemned to fine and imprisonment:

5. In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbecoming even a public prosecutor, but highly disgraceful to the character of a judge as it was subversive of justice.

ARTICLE V.

And whereas it is provided by the act of Congress passed on the twenty-fourth day of September, one thousand seven hundred and eighty-nine, intituled "An act to establish the judicial courts of the United States," that for any crime, or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the state where such offender may be found; and whereas it is provided

by the laws of Virginia, that, upon preſentment by any grand jury of an offence not capital, the court ſhall order the clerk to iſſue a ſummons againſt the perſon, or perſons offending, to appear and anſwer ſuch preſentment at the next court; yet the ſaid Samuel Chaſe did at the court aforeſaid, award a capias againſt the body of the ſaid James Thompſon Callender, indicted for an offence not capital, whereupon the ſaid Callender was arreſted and committed to cloſe cuſtody, contrary to law in that caſe made and provided.

ARTICLE VI.

And whereas it is provided by the 24th ſection of the aforeſaid act, intituled, "An act to eſtabliſh the judicial courts of the United States" that the laws of the ſeveral ſtates, except where the conſtitution, treaties, or ſtatutes of the United States ſhall otherwiſe require or provide ſhall be regarded as the rules of deciſion in trials at common law, in the courts of the United States, in caſes where they apply; and whereas by the laws of Virginia it is provided, that in caſes not capital, the offender ſhall not be held to anſwer any preſentment of a grand jury until the court next ſucceeding that during which ſuch preſentment ſhall be made, yet the ſaid Samuel Chaſe, with intent to oppreſs and procure the conviction of the ſaid James Thompſon Callender, did, at the court aforeſaid, rule and adjudge the ſaid Callender to trial during the term at which he, the ſaid Callender, was preſented and indicted, contrary to law in that caſe made and provided.

ARTICLE VII.

That at the circuit court of the United States, for the diſtrict of Delaware, held at New-Caſtle, in the month of June, one thouſand eight hundred, whereat the ſaid Samuel Chaſe preſided, the ſaid Samuel Chaſe, diſregarding the duties of his office, did deſcend from the dignity of a judge, and ſtoop to the level of an informer, by refuſing to diſcharge the grand jury, although entreated by ſeveral of the ſaid jury ſo to do; and after the ſaid grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any preſentments to make, by obſerving to the ſaid grand jury, that he the ſaid Samuel Chaſe, underſtood, that a highly ſeditious temper had manifeſted itſelf in the ſtate of Delaware among a certain claſs of people, particularly in New-caſtle county, and more eſpecially in the town of Wilmington, where lived a moſt ſeditious printer, unreſtrained by any principle of virtue, and regardleſs of ſocial order,—that the name of this printer was"—but checking himſelf, as if ſenſible of the indecorum which he was committing, added—"that it might be aſſuming too much to mention the name of this perſon, but it becomes your duty, gentlemen, to enquire diligently into this matter," or words to that effect; and that with intention to procure the proſecution of the printer in queſtion, the ſaid Samuel Chaſe did, moreover, authoritatively enjoin on the diſtrict attorney of the United States the neceſſity of procuring a file of the papers to which he alluded, (and which were underſtood to be thoſe publiſhed under the title of "Mirror of the Times and General Advertiſer,") and by a ſtrict examination of them to find ſome paſſage which might furniſh the ground work of a proſecution againſt the printer of the ſaid paper; thereby degrading his high judicial functions, and tending to impair the public confidence in, and reſpect for, the tribunals of juſtice, ſo eſſential to the general welfare.

ARTICLE VIII.

And whereas a mutual reſpect and confidence between the government of the United States and thoſe of the individual ſtates, and between the people and thoſe governments, reſpectively, are highly conducive to that public harmony, without which there can be no public happineſs, yet the ſaid Samuel Chaſe, diſregarding the duties and dignity of his judicial character; did at a circuit court, for the diſtrict of Maryland, held at Baltimore in the month of May, one thouſand eight hundred and three, pervert his official right and duty to addreſs the grand jury,

then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflamatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland against their state, government and constitution, a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the supreme court of the United States, and moreover that the said Samuel Chase, then and there, under pretence of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, endeavor to excite the odium of the said grand jury, and of the good people of Maryland against the government of the United States, by delivering opinions, which, even if the judicial authority were competent to their expression, on a suitable occasion in a proper manner, were at that time and as delivered by him, highly indecent, extra-judicial and tending to prostitute the high judicial character with which he was invested to the low purpose of an electioneering partizan.

And the house of representatives, by protestation, saving to themselves the liberty of exhibiting at any time hereafter, any further articles or other accusation, or impeachment against the said Samuel Chase, and also of replying to his answers which he shall make unto the said articles, or any of them, and of offering proof to all and every of the aforesaid articles, and to all and every other articles, impeachment or accusation, which shall be exhibited by them, as the case shall require, do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors, and that such proceedings, examinations, trials and judgments may be thereupon had and given, as are agreeable to law and justice.

IN THE

Senate of the United States,

SITTING AS A

High Court of Impeachment.

ON THE

Fourth Day of February, A. D. 1805.

THE UNITED STATES vs. SAMUEL CHASE.

The answer and pleas of SAMUEL CHASE, *one of the aſſociate juſtices of the ſupreme court of the United States, to the articles of impeachment exhibited againſt him in the ſaid court, by the honorable the House of Repreſentatives of the United States, in ſupport of their impeachment againſt him for high crimes and misdemeanors, ſuppoſed to have been by him committed.*

[Given in the 4th inſtant.]

This reſpondent, in his proper perſon, comes into the ſaid court, and proteſting that there is no high crime or miſdemeanor particularly alledged in the ſaid articles of impeachment, to which he is or can be bound by law to make anſwer; and ſaving to himſelf now, and at all times hereafter, all benefit of exception to the inſufficiency of the ſaid articles, and each of them, and to the defects therein appearing in point of law, or otherwiſe; and proteſting alſo that he ought not to be injured in any manner, by any words, or by any want of form in this his anſwer; he ſubmits the following facts and obſervations by way of anſwer to the ſaid articles.

The firſt article relates to his ſuppoſed miſconduct in the trial of John Fries, for treaſon, before the circuit court of the United States, at Philadelphia, in April and May, 1800; and alledges that he preſided at that trial, and that "unmindful of the ſolemn duties of his office, and contrary to the ſacred obligation by which he ſtood bound to diſcharge them, faithfully and impartially, and without reſpect to perſons," he did then, "in his judicial capacity, conduct himſelf in a manner highly arbitrary, oppreſſive, and unjuſt."

This general accuſation, too vague in itſelf for reply, is ſupported by three ſpecific charges of miſconduct:

1ſt. In delivering an opinion, in writing, on the queſtion of law, on the conſtruction of which the defence of the accuſed materially depended; which opinion, it is alledged, tended "to prejudice the minds of the jury againſt the caſe of the ſaid John Fries, the priſoner, before counſel had been heard in his favor."

2d. "In reſtricting the counſel for the ſaid John Fries, from recurring to ſuch Engliſh authorities as they believed appoſite; or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions upon which

they intended to reſt the defence of their client."

3d. "In debarring the priſoner from his conſtitutional privilege of addreſſing the jury (through his counſel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the ſame time endeavoring to wreſt from the jury their indiſputable right to hear argument, and determine upon the queſtion of law, as well as the queſtion of fact, involved in the verdict which they were required to give."

This firſt article then concludes, that in conſequence of this irregular conduct of this reſpondent, "the ſaid John Fries was deprived of the right ſecured to him by the *eighth* article amendatory of the conſtitution; and was condemned to death, without having been heard by counſel, in his defence."

By the eighth article amendatory to the conſtitution, this reſpondent ſuppoſes is meant the *ſixth* amendment to the conſtitution of the United States; which ſecures to the accuſed, in all criminal proſecutions, the right to have the aſſiſtance of counſel for his defence.

In anſwer to theſe three charges, the reſpondent admits that the circuit court of the United States, for the diſtrict of Pennſylvania, was held at Philadelphia, in that diſtrict, in the months of April and May, in the year of our Lord one thouſand eight hundred; at which court John Fries, the perſon named in the ſaid firſt article, was brought to trial, on an indictment for treaſon againſt the United States; and that this reſpondent then held a commiſſion as one of the aſſociate juſtices of the ſupreme court of the United States; by virtue of which office he did, purſuant to the laws of the United States, preſide at the above mentioned trial, and was aſſiſted therein by Richard Peters, Eſq. then, and ſtill diſtrict judge of the United States, for the diſtrict of Pennſylvania; who, as directed by the laws of the United States, ſat as aſſiſtant judge at the ſaid trial.

With reſpect to the opinion which is alledged to have been delivered by this reſpondent at the above mentioned trial; he begs leave to lay before this honorable court the true ſtate of that tranſaction; and to call its attention to ſome facts and conſiderations, by which his conduct on that ſubject will, he preſumes, be fully juſtified.

The conſtitution of the United States, in the third ſection of the third article, declares that "treaſon againſt the United States ſhall conſiſt *only in levying war againſt them*, or in adhering to their enemies, giving them aid and comfort.

By two acts of Congreſs, the firſt paſſed on the third day of March, 1791, and the ſecond on the eighth day of May, 1792, a duty was impoſed on ſpirits diſtilled within the United States, and on ſtills; and various proviſions were made for its collection.

In the year 1794, an inſurrection took place in four of the weſtern counties of Pennſylvania, with a view of reſiſting and preventing by force the execution of theſe two ſtatutes; and at a circuit court of the United States, held at Philadelphia, for the diſtrict of Pennſylvania, in the month of April, in the year 1795, by William Patterſon, Eſq. then one of the aſſociate juſtices of the ſupreme court of the United States, and the above mentioned Richard Peters, then diſtrict judge of the United States for the diſtrict of Pennſylvania, two perſons, who had been concerned in the above named inſurrection, namely, Philip Vigol and John Mitchel, were indicted for treaſon of levying war againſt the United States, by reſiſting and preventing by force the execution of the two laſt mentioned acts of Congreſs; and were, after a full and very ſolemn trial, convicted on the indictments, and ſentenced to death. They were afterwards pardoned by George Waſhington, then Preſident of the United States.

In the firſt of theſe trials, that of Vigol, the defence of the priſoner was conducted by very able counſel, one of whom,

William Lewis, Esq. is the same person who appeared as counsel for John Fries, in the trial now under consideration.—Neither that learned gentleman, nor his able colleague, then thought proper to raise the question of law, "whether resisting and preventing by armed force, the execution of a *particular* law of the U. States, be a "levying of war against the U. States," according to the true meaning of the constitution? although a decision of this question in the negative, must have acquitted the prisoner. But in the next trial, that of Mitchell, this question was raised on the part of the prisoner, and was very fully and ably discussed by his counsel; and it was solemnly determined by the court, both the judges concurring, "that to resist or prevent by armed force, the execution of a particular law of the U. States, is a levying of war against the United States, and consequently is treason, within the true meaning of the constitution." The decision, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, although not absolutely obligatory, ought to be viewed with very great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness.

On the 9th of July, 1798, an act of Congress was passed, providing for a valuation of lands and dwelling houses, and an enumeration of slaves throughout the United States; and directing the appointment of commissioners and assessors for carrying it into execution: And on the 4th day of July, in the same year, a direct tax was laid by another act of Congress, of that date, on the lands, dwelling houses, and slaves, so to be valued and enumerated.

In the months of February and March, A. D. 1799, an insurrection took place in the counties of Bucks and Northampton, in the state of Pennsylvania, for the purpose of resisting and preventing by force, the execution of the two last mentioned acts of Congress, and particularly that for the valuation of lands and dwelling houses. John Fries, the person mentioned in the article of impeachment now under consideration, was apprehended and committed to prison, as one of the ring-leaders of this insurrection; and at a circuit court of the United States, held at Philadelphia, in and for the district of Pennsylvania, in the month of April, A. D. 1799, he was brought to trial for this offence, on an indictment for treason, by levying war against the United States, before James Iredel, Esq. then one of the associate justices of the supreme court of the United States, who presided in the said court, according to law, and the above mentioned Richard Peters, then district judge of the United States, for the district of Pennsylvania, who sat in the said circuit court as assistant judge.

In this trial, which was conducted with great solemnity, and occupied nine days, the prisoner was assisted by William Lewis and Alexander James Dallas, Esqs. two very able and eminent counsellors; the former of whom, William Lewis, is the person who assisted as above mentioned, in conducting the defence of Vigol, on a similar indictment. These gentlemen, finding that the facts alledged were fully and undeniably proved, by a very minute and elaborate examination of witnesses, thought proper to rest the case of the prisoner on the question of law which had been determined in the cases of Vigol and Mitchell above mentioned, and had then been acquiesced in, but which they thought proper again to raise. They contended, "that to resist by force of arms a particular law of the U. States, does not amount to levying war against the United States, within the true meaning of the constitution, and therefore it is not *treason*, but a *riot* only." This question they argued at great length, and with all the force of their learning and genius; and after a very full discussion at the bar, and the most mature deliberation by the court, the learned and excellent judge who then presided, and who was no less distinguished by his humanity and tenderness towards persons tried before him, than by his extensive knowledge and great talents as a lawyer, pronounced the opinion of himself and his colleague, "that to resist or prevent by force the execution of a particular law of the U. States, does not amount to levying war against them, within the true meaning of the constitution, and does not therefore constitute the crime of treason," thereby

adding the weight of another and more solemn decision to the precedent which had been established in the above mentioned cases of Vigol and Mitchell.

Under this opinion of the court on the question of law, the jury, having no doubt as to the facts, found the said John Fries guilty of treason, on the above mentioned indictment. But a new trial was granted by the court, not by reason of any doubt as to the correctness of the decision on the question of law, but solely on the ground, as this respondent hath understood and believes, that one of the jurors of the petit jury, after he was summoned, but before he was sworn on the trial, had made some declaration unfavorable to the prisoner.

The yellow fever having appeared in Philadelphia in the summer of the year 1799, the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania, did according to law appoint the next circuit court of that district, to be held at Norris-Town therein: Pursuant to which appointment, a circuit court was held at Norris-Town aforesaid, in and for the said district, on the 11th day of October, in the last mentioned year, before Bushrod Washington, Esq. then one of the associate justices of the supreme court of the United States, and the above mentioned Richard Peters; at which court no proceedings were had on the aforesaid indictment against John Fries, because, as this respondent hath been informed and believes, the commission of the marshal of the said district had expired, before he summoned the jurors to attend at the said court, and had not been renewed; by reason of which no legal pannel of jurors could be formed.

On the 11th day of April, A. D. 1800, and from that day until the 2d day of May in the same year, a circuit court of the United States was held at Philadelphia, in and for the district of Pennsylvania, before this respondent, then one of the associate justices of the supreme court of the United States, and the above mentioned Richard Peters, then district judge of the United States for the district of Pennsylvania. At this court, the indictment on which the said John Fries had been convicted as above mentioned, was quashed ex officio by William Rawle, Esq. then attorney of the United States for the district of Pennsylvania, and a new indictment was by him preferred against the said John Fries, for treason of levying war against the United States, by resisting and preventing by force, in the manner above set forth, the execution of the above mentioned acts of Congress, for the valuation of lands and dwelling-houses and the enumeration of slaves, and for levying and collecting a direct tax. This indictment, of which a true copy marked exhibit No. I, is herewith exhibited by this respondent, who prays that it may be taken as part of this his answer, being found by the grand jury on the 16th day of April, 1800, the said John Fries was on the same day arraigned thereon, and plead not guilty. William Lewis and Alexander James Dallas, Esqrs. the same persons who had conducted his defence at his former trial, were again at his request assigned by the court as his counsel: and his trial was appointed to be had, on Tuesday the 22d day of the last mentioned month of April.

After this indictment was found by the grand jury, this respondent considered it with great care and deliberation, and finding, from the three overt acts of treason which it charged, that the question of law arising upon it, was the same question which had already been decided twice in the same court, on solemn argument and deliberation, and one in that very case, he considered the law as settled by those decisions, with the correctness of which on full consideration he was entirely satisfied; and by the authority of which he should have deemed himself bound, even had he regarded the question as doubtful in itself. They are moreover in perfect conformity with the uniform tenor of decisions in the courts of England and Great Britain, from the revolution in 1668, to the present time, which in his opinion, added greatly to their weight and authority.

And surely we need not urge to this honorable court, the correctness, the importance, and the absolute necessity of adhering to principles of law once established, and of considering the law as finally settled, after repeated and solemn decisions by courts of competent jurisdiction. A contrary principle would unset-

tle the baſis of our whole ſyſtem of juriſprudence, hitherto our ſafeguard and our boaſt; would reduce the law of the land, and ſubject the rights of the citizen to the arbitrary will, the paſſions, or the caprice of the judge in each particular caſe; and would ſubſtitute the varying opinions of various men, inſtead of that fixed, permanent rule, in which the very eſſence of the law conſiſts. If this reſpondent erred in regarding this point as ſettled, by the repeated and ſolemn adjudications of his predeceſſors, in the ſame court and in the ſame caſe; if he erred in ſuppoſing, that a principle eſtabliſhed by two ſolemn deciſions, was obligatory upon him, ſitting in the ſame court where thoſe deciſions had been made; if he erred in believing that it would be the higheſt preſumption in him, to ſet up his opinion and judgment over that of his colleague, who had twice decided the ſame queſtion, and of two of his predeceſſors, who juſtly rank among the ableſt judges that have ever adorned a court; if in all this he erred, it is an error of which he cannot be aſhamed, and which he truſts will not be deemed criminal in the eyes of this honorable court, of his country, or of that poſterity by which he, his accuſers, and his judges, muſt one day be judged.

Under the influence of theſe conſiderations, this reſpondent drew up an opinion on the law, ariſing from the overt acts ſtated in the ſaid indictment, which was conformable to the deciſions before given as above mentioned, and which he ſent to his colleague, the ſaid Richard Peters, for his conſideration. That gentleman returned it to this reſpondent, with ſome amendments affecting the form only, but not in any manner touching the ſubſtance.

The opinion thus agreed to, this reſpondent thought it proper to communicate to the priſoner's counſel—ſeveral reaſons concurred in favor of this communication.

In the firſt place, this reſpondent conſidered himſelf and the court, as bound by the authority of the former deciſions; eſpecially the laſt of them, which was on the ſame caſe. He conſidered the law as ſettled, and had every reaſon to believe that his colleague viewed it in the ſame light. It was not ſuggeſted or underſtood, that any new evidence was to be offered; and he knew that if any ſhould be offered, which could vary the caſe, it would render wholly inapplicable both the opinion and the former deciſions on which it was founded. And he could not and did not ſuppoſe, that the priſoners counſel would be deſirous of waſting very precious time, in addreſſing to the court an uſeleſs argument on a point which that court held itſelf precluded from deciding in their favor. He therefore conceived that it would be rendering the counſel a ſervice and a favor, to appriſe them before hand of the view which the court had taken of the ſubject; ſo as to let them ſee in time the neceſſity of endeavoring to produce new teſtimony, which might vary the caſe, and take it out of the authority of former deciſions.

Secondly. There were more than one hundred civil cauſes then depending in the ſaid court as appears by the exhibit marked No. 1, which this reſpondent prays may be taken as part of this, his anſwer. Many of thoſe cauſes had already been ſubjected to great delay, and it was the peculiar duty of this reſpondent, as preſiding judge, to take care, that as little time as poſſible ſhould be unneceſſarily conſumed, and that every convenient and proper diſpatch ſhould be given to the buſineſs of the citizens. He did believe that an early communication of the court's opinion, might tend to the ſaving of time, and conſequently to the diſpatch of buſineſs.

Thirdly. As the court held itſelf bound by the former deciſions, and could not therefore alter its opinion in conſequence of any argument; and as it was the duty of the court to charge the jury on the law, in all caſes ſubmitted to their conſideration, he knew that this opinion muſt not only be made known at ſome period for other of the trial, but muſt at the end of the trial be expreſsly delivered to the jury by him, in a charge from the bench; and he could not ſuppoſe and cannot yet imagine, that an opinion, which was to be thus ſolemnly given in charge to the jury, at the cloſe of the trial, could make any additional impreſſion on their minds, from the circumſtance of its being intimated to the counſel before the trial began, in the

hearing of thoſe who might be afterwards ſworn on the jury.

And, laſtly, it was then his opinion, and ſtill is, that it is the duty of every court of this country, and was his duty on the trial now under conſideration, to guard the jury againſt erroneous impreſſions reſpecting the laws of the land. He well knows, that it is the right of juries in criminal caſes, to give a general verdict of acquittal, which cannot be ſet aſide on account of its being contrary to law, and that hence reſults the power of juries, to decide on the laws as well as on the facts, in all criminal caſes. This power he holds to be a ſacred part of our legal privileges, which he never has attempted, and never will attempt to abridge or to obſtruct.—But he alſo knows, that in the exerciſe of this power, it is the duty of the jury to govern themſelves by the laws of the land, over which they have no diſpenſing power; and their right to expect and receive from our court, all the aſſiſtance which it can give, for rightly underſtanding the law. To withhold this aſſiſtance, in any manner whatever; to forbear to give it in that way, which may be moſt effectual for preſerving the jury from error and miſtake; would be an abandonment or forgetfulneſs of duty, which no judge could juſtify to his conſcience or to the laws. In this caſe, therefore, where the queſtion of law ariſing on the indictment, had been finally ſettled by authoritative deciſions, it was the duty of the court, and eſpecially on this reſpondent as preſiding judge, early to apprize the counſel and the jury of theſe deciſions, and their effect, ſo as to ſave the former from the danger of making an improper attempt, to miſlead the jury in a matter of law, and the jury from having their minds pre-occupied by erroneous impr ſſions.

It was for theſe reaſons, that on the 22d day of April 1800, when the ſaid John Fries was brought into court, and placed in the priſoners' box for trial, but before the petit jury was impanelled to try him, this reſpondent informed the above mentioned William Lewis, one of his counſel, the aforeſaid Alexander James Dallas not being then in court, "that the court had deliberately conſidered the indictment againſt John Fries for treaſon, and the three ſeveral overt acts of treaſon ſtated therein: That the crime of treaſon was defined by the conſtitution of the United States; that as the Federal legiſlature had the power to make, alter, or repeal laws, ſo the judiciary only had the power, and it was their duty, to declare, expound and interpret the conſtitution and laws of the United States: That it was the duty of the court, in all criminal caſes, to ſtate to the petit jury, their opinion of the law ariſing on the facts; but the jury in all criminal caſes were to decide both the law and the facts, on a conſideration of the whole caſe: That there muſt be ſome conſtructive expoſition of the terms uſed in the conſtitution, "levying war againſt the United States;" That the queſtion, what acts amounted to levying war againſt the United States, or the government thereof, was a queſtion of law, and had been decided by judges Patterſon, and Peters, in the caſes of Vigol and Mitchell, and by judges Iredell and Peters, in the caſe of John Fries, priſoner, at the bar, in April 1799: That judge Peters remained of the ſame opinion, which he had twice before delivered, and he, this reſpondent, on long and great conſideration, concurred in the opinion of judges Patterſon, Iredell and Peters; that to prevent unneceſſary delay, and to ſave time on the trial of John Fries, and to prevent a delay of juſtice in the great number of civil cauſes depending for trial at that term, the court had drawn up in writing, their opinion of the law, ariſing on the overt acts, ſtated in the indictment againſt John Fries; and had directed David Caldwell, their clerk, to make out three copies of their opinion, one to be delivered to the attorney of the diſtrict, one to the counſel for the priſoner, and one to the petit jury, after they ſhould have been impanelled and heard the indictment read to them by the clerk, and after the diſtrict attorney ſhould have ſtated to them the law on the overt acts alledged in the indictment, as it appeared to him.

After theſe obſervations, this reſpondent delivered one of the above mentioned copies to the aforeſaid William Lewis, then attending as one of the priſoner's counſel; who read part of it, and then laid it down on the table before him.—Some obſervations were then made on the ſubject by him and the above mentioned Alexander James Dallas, who had then come into court; but this reſpondent

doth not now recollect thoſe obſervations, and cannot undertake to ſtate them accurately.

And this reſpondent further ſaith, that the paper marked exhibit No. II, and herewith exhibited, which he prays leave to make part of this his anſwer, is a true copy of the original opinion, drawn up by him and concurred in by the ſaid Richard Peters, as above ſet forth, which original opinion is now in the poſſeſſion of this reſpondent, ready to be produced to this honorable court. He may have erred in forming this opinion, and in the time and manner of making it known to the counſel for the priſoner. If he erred in forming it, he erred in common with his colleague and with two of his predeceſſors; and he preſumes to hope that an error which has never been deemed criminal in them, will not be imputed as a crime to him, who was led into it by their example and their authority. If he erred in the time and manner of making known this opinion, he feels a juſt confidence, that when the reaſons which he has alledged for his conduct, and by which it ſeemed to him to be fully juſtified, ſhall come to be carefully weighed, they will be ſufficient to prove, if not that this conduct was perfectly regular and correct, yet that he might ſincerely have conſidered it as right; and that in a caſe where ſo much doubt may exiſt, to have committed a miſtake is not to have committed a crime.

And this reſpondent further anſwering inſiſts, that the opinion thus delivered to the priſoner's counſel, viz. that "any inſurrection or riſing of any body of people within the United States, for the purpoſe of reſiſting or preventing by force or violence, under any pretence whatever, the execution of any ſtatute of the United States, for levying or collecting taxes, or for any other object of a general or national concern, is levying war againſt the United States, within the contemplation and true meaning of the conſtitution of the United States," is a legal and correct opinion, ſupported not only by the two previous deciſions above mentioned, but alſo by the plaineſt principles of law and reaſon, and by the uniform tenor of legal adjudications in England and Great Britain, from the revolution in 1688 to this time. It ever was, and now is his opinion, that the peace and ſafety of the national federal government, muſt be endangered, by any other conſtruction of the terms "levying war againſt the United States," uſed by the federal conſtitution; and he is confident that no judge of the federal government, no judge of a ſuperior ſtate court, nor any gentleman of eſtabliſhed reputation for legal knowledge, would or could deliberately give a contrary opinion.

If, however, this opinion were erroneous, this reſpondent would be far leſs cenſurable than his predeceſſors, by whoſe example he was led aſtray, and by whoſe authority he conſidered himſelf bound. Was it an error to conſider himſelf bound by the authority of their previous deciſions? If it were, he was led into the error by the uniform courſe of judicial proceedings in this country and England, and is ſupported in it by one of the fundamental principles of our juriſprudence. Can ſuch an error be a crime or miſdemeanor?

If, on the other hand, the opinion be in itſelf correct, as he believes and inſiſts that it is, could the expreſſion of a correct opinion on the law, whenever and however made, miſlead the jury, infringe their rights, or give an improper bias to their judgment? Could truth excite improper prejudice? Could the jury be leſs prepared to hear the law diſcuſſed, and to decide on it correctly, becauſe it was correctly ſtated to them by the court? And is not that a new kind of offence, in this country at leaſt, which conſiſts in telling the truth, and giving a correct expoſition of the laws.

As to the ſecond ſpecific charge adduced in ſupport of the firſt article of impeachment, which accuſes this reſpondent, "of reſtricting the counſel for the ſaid Fries, from recurring to ſuch Engliſh authorities as they believed oppoſite, or from citing certain ſtatutes of the United States, which they deemed illuſtrative of the poſitions upon which they intended to reſt the defence of their client," this reſpondent admits that he did, on the above mentioned trial, expreſs it as his opinion to the aforeſaid counſel for the priſoner, "that the deciſions in England, in caſes of indictments for treaſon at common law, againſt the perſon of the king, ought not to be read

to the jury, on trials for treaſon under the conſtitution and ſtatutes of the United States; becauſe ſuch deciſions could not inform, but might miſlead and deceive the jury; that any deciſions on caſes of treaſon, in the courts of England, before the revolution of 1688, ought to have very little influence in the courts of the United States; that he would permit deciſions in the courts of England or of Great Britain, ſince the ſaid revolution, to be read to the court or jury for the purpoſe of ſhewing what acts have been conſidered by thoſe courts, as a conſtructive levying of war againſt the king of that country, in his legal capacity, but not againſt his perſon; becauſe levying war againſt *his government*, was of the ſame nature as levying war againſt *the government of the United States*; but that ſuch deciſions, nevertheleſs, were not to be conſidered as authorities binding on the courts andgjuries of this country, but merely in the light of opinions entitled to great reſpect as having been delivered after full conſideration, by men of great legal learning and ability.

Theſe are the opinions which he did on that occaſion deliver to the counſel for the priſoner, and which he then thought, and ſtill thinks, it was his duty to deliver. The counſellors admitted to practice in any court of juſtice, are, in his opinion, and according to univerſal practice, to be conſidered as officers of ſuch courts and miniſters of juſtice therein, and as ſuch, ſubject to the direction and control of the court, as to their conduct in its preſence, and in conducting the defence and criminals on trial before it.—As counſel, they owe to the perſon accuſed, diligence, fidelity and ſecrecy, and to the court and jury, due and correct information according to the beſt of their knowledge and ablity, on every matter of law which they attempt to adduce in argument. The court on the other hand, hath power, and is bound in duty, to decide and direct what evidence, whether by record or by precedents of deciſions in courts of juſtice, is proper to be admitted for the eſtabliſhment of any matter of law or fact. Conſequently, ſhould counſel attempt to read to the jury, as a law ſtill in force, a ſtatute which had been repealed, or a deciſion which had been reverſed, or the judgments of courts in countrys whoſe laws have no connection with ours, it would be the duty of the court to interpoſe, and prevent ſuch an impoſition from being practiced on the jury. For theſe reaſons this reſpondent thinks that his conduct was correct in expreſſing to the counſel for Fries, the opinions ſtated above. He is not bound to anſwer here for the correctneſs of thoſe principles, though he thinks them inconteſtible; but merely for the correctneſs of his motives in delivering them. A contrary opinion would convert this honorable court, from a court of impeachment into a court of appeals; and would lead directly to the ſtrange abſurdity, that whenever the judgment of an inferior court ſhould be reverſed on appeal or writ of error, the judges of that court muſt be convicted of high crimes and miſdemeanors, and turned out of office; that error in judgment is a puniſhable offence, and that crimes may be committed without any criminal intention.—Againſt a doctrine ſo abſurd and miſchievous, ſo contrary to every notion of juſtice hitherto entertained, ſo utterly ſubverſive of all that part of our ſyſtem of juriſprudence, which has been wiſely and humanely eſtabliſhed for the protection of innocence, this reſpondent deems it his duty now, and on every fit occaſion, to enter his proteſt and lift up his voice; and he truſts, that in the diſcharge of this duty, infinitely more important to his country than to himſelf, he ſhall find approbation and ſupport in the heart of every American, of every man throughout the world, who knows the bleſſings of civil liberty, or reſpects the principles of univerſal juſtice.

It is only then, for the correctneſs of his motives in delivering theſe opinions, that he can now be called to anſwer; and this correctneſs ought to be preſumed, unleſs the contrary appear by ſome direct proof, or by ſome violent preſumption ariſing from his general conduct on the trial, or from the glaring impropriety of the opinion itſelf. For he admits that caſes may be ſuppoſed, of an opinion delivered by a judge ſo palpably erroneous, unjuſt and oppreſſive, as to preclude the poſſibility of its having proceeded from ignorance or miſtake.

Do the opinions now under conſideration bear any of these marks? This

honorable court need not be informed that there has existed in England, no such thing as treason at common law, since the year 1350, when the statute of the 25th Edward III, chap 2, declaring what alone should in future be judged treason, was passed. It is perfectly clear that decisions made before that statute, 450 years ago, when England, together with the rest of Europe, was still wraped in the deepest gloom of ignorance & barbarism; when the system of English jurisprudence was still in its infancy; when law, justice and reason, were perpetually trampled under foot by feudal oppression and feudal anarchy; when under an able and vigorous monarch, every thing was adjudged to be treason which he thought fit to call so, and under a weak one, nothing was considered as treason which turbulent, powerful, and rebellious nobles thought fit to perpetrate; is it perfectly clear that decisions, made at such a time, and under such circumstances, ought to be received by the courts of this country as authorities to govern their decisions, or lights to guide the understanding of juries? Is it perfectly clear that decisions made in England, on the subject of treason, before the revolution of 1688, by which alone the balance of the English constitution was adjusted and the English liberties were fixed on a firm basis; decisions made either during the furious civil wars, in which two rival families contended for the crown; when in the vicissitudes of war, death and confiscation in the forms of law, continually walked in the train of the victors, and actions were treasonable or praise worthy, according to the preponderance of the party by whose adherents they were perpetrated; during the reigns of three able & arbitary monarchs who succeeded this dreadful conflict, and relaxed or invigorated the law of treason, according to their anger, their policy, or their caprice; or during those terrible struggles between the principles of liberty, not yet well defined or understood, on one hand, & arbitrary power, insinuating itself under the forms of the constitution on the other; struggles which presented at some times the wildest anarchy, at others the extremes of servile submission, and after having brought one king to the scaffold, ended in the expulsion of another from his throne? Is it clear that decisions on the law of treason, made in times like these, ought not only to be received as authorities in the courts of this country, but also to have great influence on their decisions? Is it clear that decisions made in England, as to what acts will amount to levying war against the king, personally, and not against his government, are applicable to the constitution and laws of this country? It is clear that such English decisions on the subject of treason, as are applicable to our constitution and laws, are to be received in our courts, not merely as the opinions of learned and able men, which may enlighten their judgment, but as authorities which ought to govern absolutely their decisions?—Is all this so clear, that a judge could not honestly and sincerely have thought the contrary? That he could not have expressed an opinion to the contrary without currupt or improper motives? If it be not thus clear, then must it be admitted that this respondent, sincerely and honestly, and in the best of his judgment considered these decisions as wholly inadmissible, or admissible only for the purposes and to the extent which he pointed out.

And if he did so consider them, was it not his duty to prevent them from being read to the jury, except under those restrictions, and for those purposes? Would his duty permit him to sit silently, and see the jury imposed on and misled? To sit silently and hear a book read to them as containing the law, which he knew did not contain the law? Such silence would have rendered him a party to the deception, and would have justly subjected him to all the contumely, which a conscientious and courageous discharge of his duty, has so unmeritedly brought on his name.

With respect to the statutes of the United States, which he is charged with having prevented the prisoner's counsel from citing on the aforesaid trial, he denies that he prevented any act of Congress from being cited, either to the court or jury, on the said trial; or declared at any time, that he would not permit the prisoner's counsel to read to the jury, or to the court, any act of Congress whatever. Nor does he remember or believe, that he expressed on the said trial any disapprobation of the conduct of the circuit court before whom the said case was first tried, in permitting the act of Congress relating

to crimes less than treason, commonly called the *sedition act*, to be read to the jury. He admits indeed that he was then and still is of opinion, that the said act of congress wholly was irrelevant to the issue, in the trial of John Fries, and therefore ought not to have been read to the jury, or regarded by them. This opinion may be erroneous, but he trusts that the following reasons on which it was founded, will be considered by this honorable court, as sufficiently strong to render it possible. and even probable, that such an opinion might be sincerely held and honestly expressed :— 1st. That congress did not intend by the sedition law to define the crime of treason by "levying war." Treason and sedition are crimes very distinct in their natures, and subject to very different punishments ; the former by death, and the latter by fine and imprisonment. 2dly. The sedition law makes a combination or conspiracy, with intent to impede the operation of any law of the United States, or the advising or attempting to procure any insurrection or riot, a high misdemeanor, punishable by fine and imprisonment ; but a combination or conspiracy with intent to prevent the execution of a law, or with intent to raise an insurrection for that purpose, or even with intent to commit treason, is not treason by "levying war" against the United States, unless it be followed by an attempt to carry such combination or conspiracy into effect, by actual force or violence. 3dly. The constitution of the United States is the fundamental and supreme law, and having defined the crime of treason, congress could not give any legislative interpretation or exposition of that crime, or of the part of the constitution by which it is defined. 4thly. The judicial authority of the United States is alone vested with power to expound their constitution and laws.

And this respondent further answering saith, that after the above mentioned proceedings had taken place in the said trial, it was postponed until the next day, Wednesday, April 23d, 1800 ; when at the meeting of the court, this respondent told both the above mentioned counsel for the prisoner, "that to prevent any misunderstanding of any thing that had passed the day before, he would inform them, that although the court retained the same opinion of the law, arising on the overt acts charged in the indictment against Fries, yet the counsel would be permitted to offer arguments to the court, for the purpose of shewing them that they were mistaken in the law ; and that the court, if satisfied that they had erred in opinion, would correct it ; and also that the counsel would be permitted to argue before the petit jury, that the court were mistaken in the law." And this respondent added, that the court had given no opinion as to the facts in the case, about which both the counsel had declared that there would be no controversy.

After some observations by the said William Lewis and Alexander James Dallas, they both declared to the court, "that they did not any longer consider themselves as the counsel for John Fries, the prisoner. This respondent then asked the said John Fries, whether he wished the court to appoint other counsel for his defence ? He refused to have other counsel assigned ; in which he acted, as this respondent believes and avers, by the advice of the said William Lewis and Alexander James Dallas : whereupon the court ordered the said trial to be had on the next day, Thursday, the 24th of April, 1800.

On that day the trial was proceeded in ; and before the jurors were sworn, they were, by the direction of the court, severally asked on oath, whether they were in any way related to the prisoner, and whether they had ever formed or delivered any opinion as to his guilt or innocence, or that he ought to be punished ? Three of them answering in the affirmative, were withdrawn from the pannel. The said John Fries was then informed by the court, that he had a right to challenge thirty-five of the jury, without shewing any cause of challenge against them, and as many more as he could shew cause of challenge against. He did accordingly challenge peremptorily thirty-four of the jury, and the trial proceeded. In the evening, the court adjourned till the next day, Friday, the 25th of April ; when after the district attorney had stated the principal facts proved by the witnesses, and had applied the law to those facts, this respondent, with the concurrence of his colleague, the said Richard Peters, delivered to the jury the charge contained and expressed in exhibit marked No. 3, and herewith filed, which he prays may be taken as part of this his answer.

Immediately after the petit jury had delivered their verdict, this respondent informed the said Fries, from the bench, that if he, or any person for him, could show any legal ground, or sufficient cause to arrest the judgment, ample time would be allowed him for that purpose. But no cause being shewn, sentence of death was passed on the said Fries on the 2d day of May, 1800, the last day of the term; & he was afterwards pardoned by John Adams, then President of the United States.

And this respondent further answering saith, that if the two instances of misconduct, first stated in support of the general charge contained in the first article of impeachment, were true as alledged, yet the inference drawn from them, viz. "that the said Fries was hereby deprived of the benefit of counsel for his defence," is not true. He insists that the said Fries was deprived of the benefit of counsel, not by any misconduct of this respondent, but by the conduct and advice of the above mentioned William Lewis and Alexander James Dallas, who having been, with their own consent, assigned by the court as counsel for the prisoner, withdrew from his defence, and advised him to refuse other counsel when offered to him by the court, under pretence that the law had been prejudged, and their liberty of conducting the defence, according to their own judgment, improperly, restricted by this respondent; but in reality because they knew the law and the facts to be against them, and the case to be desperate, and supposed that their withdrawing themselves under this pretence, might excite odium against the court; might give rise to an opinion that the prisoner had not been fairly tried; and in the event of a conviction, which from their knowledge of the law and the facts, they knew to be almost certain, might aid the prisoner in an application to the President for a pardon. That such was the real motive of the said prisonser's counsel, for depriving their client of legal assistance on this trial, this respondent is fully persuaded, and expects to make appear, not only from the circumstances of the case, but from their own frequent and public declarations.

As little can this respondent be justly charged with having by any conduct of his, endeavoured to "wrest from the jury their indisputable right to hear argument, and determine upon the question of law as well as the question of fact involved in the verdict which they were required to give." He denies that he did at any time declare that the aforesaid counsel should not at any time address the jury, or did in any manner, hinder them from addressing the jury on the law as well as on the facts arising in the case. It was expressly stated in the copy of his opinion delivered as above set forth to William Lewis, that the jury had a right to determine the law as well as the fact: and the said William Lewis and Alexander James Dallas were expressly informed, before they declared their resolution to abandon the defence, that they were at liberty to argue the law to the jury. This respondent believe that the said William Lewis did not read the opinion delivered to him as aforesaid, except a very small part at the beginning of it, and of course, acted upon it without knowing its contents: and that the said Alexander James Dallas read no part of the said opinion until about a year ago, when he saw a very imperfect copy, made in court by a certain W. S. Biddle.

And this respondent further answering saith, that according to the constitution of the United States, *civil officers* thereof, and no other persons, are subject to impeachment; and they only for treason, bribery, corruption or other high crime or misdemeanor, consisting in some act done or committed, in violation of some law forbidding or commanding it; on conviction of which act, they *must* be removed from office; and may, after conviction, be indicted and punished therefor, according to law. Hence it clearly results, that no civil officer of the United States can be impeached, except for some offence for which he may be indicted at law; and that no evidence can be received on an impeachment, except such as on an indictment at law, for the same offence, would be admissible. That a judge cannot be indicted or punished according to law, for any act whatever, done by him in his judicial capacity, and in a matter of which he has jurisdiction, through error of judgment merely, without corrupt motives, however manifest his error may be, is a principle resting on the plainest maxims of reason and justice, supported by the highest legal authority, and sanctioned by the universal sense of mankind. He hath already endeavoured to shew, and he hopes with success, that all the opinions delivered by him in the course of the trials now under consideration, were correct

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in themselves, and in the time and man-

ner of expressing them; and that even admitting them to have been incorrect, there was such strong reason in their favor, as to remove from his conduct every suspicion of improper motives. If these opinions were incorrect, his mistake in adopting them, or in the time or manner of expressing them, cannot be imputed to him as an offence of any kind, much less as an high crime and misdemeanor, for which he ought to be removed from office; unless it can be shewn by clear and legal evidence, that he acted from corrupt motives. Should it be considered that some impropriety is attached to his conduct, in the time and mode of expressing any of these opinions; still he apprehends, that a very wide difference exists between such impropriety, the casual effects of human infirmity, and a high crime and misdemeanor for which he may be impeached, and must on conviction be removed from office.

Finally, this respondent, having thus laid before this honorable court a true state of his case, so far as respects the first article of impeachment, declares, upon the strictest review of his conduct during the whole trial of John Fries for treason, that he was not on that occasion unmindful of the solemn duties of his office as a judge;—that he faithfully, and impartially, and according to the best of his ability and understanding, discharged those duties towards the said John Fries; and that he did not in any manner, during the said trial, conduct himself arbitrarily, unjustly, or oppressively, as he is accused by the honorable the House of Representatives.

And the said Samuel Chase, for plea to the said first article of impeachment, saith, that he is not guilty of any high crime or misdemeanor, as in and by the said first article is alledged; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The second article of impeachment charges, that this respondent, at the trial of James Thompson Callender for a libel, in May 1800, did, "with intent to oppress and procure the conviction of the said Callender, overrule the objection of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind as to the publication from which the words, charged to be libellous in the indictment, were extracted."

In answer to this article, this respondent admits that he did, as one of the associate justices of the supreme court of the United States, hold the circuit court of the United States, for the district of Virginia, at Richmond, on Thursday the 22d day of May, in the year 1800, and from that day, till the 30th of the same month—when Cyrus Griffin, then district judge of the United States for the district of Virginia, took his seat in the said court; and that during the residue of that session of the said court, which continued till the day of June, in the same year, this respondent and the said Cyrus Griffin, held the said court together. But how far any of the other matters charged in this article, are founded in truth or law, will appear from the following statement;—which he submits to this honorable court, by way of answer to this part of the accusation.

By an act of Congress passed on the 4th day of May, A. D. 1798, it is among other things enacted, "That if any person shall write, print, utter or publish, or shall knowingly and wittingly assist and aid in writing, printing, uttering or publishing, any false, scandalous, and malicious writing or writings, against the President of the United States, with intent to defame, or to bring him into contempt or disrepute, such person, being thereof convicted, shall be punished by a fine, not exceeding two thousand dollars, and by imprisonment, not exceeding two years:" and "that if any person shall be prosecuted under this act, it shall be lawful for him to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel; and the jury shall have a right to determine the law and the fact, under the direction of the court, as in other cases," as in and by the said act, commonly called the *sedition law*, to which this respondent, begs leave to refer this honourable court, will more fully appear.

At the meeting of the last above mentioned circuit court, this respondent, as required by the duties of his office, delivered a charge to the grand jury; in which, according to his constant practice, and to his duty as a judge, he gave in charge to them, several, acts of Congress for the punishment of offences, and among them, the above mentioned act, called the sedition law; and directed the said jury to make particular enquiry, concerning any breaches of these statutes or any of them, within the district of Virginia. On the 24th day of May, 1800, the said jury

found an indictment against one James Thompson Callender, for printing and publishing, against the form of the said act of Congress, a false, scandalous, and malicious libel, called, "The Prospect before Us," against John Adams, then President of the United States, in his official character as President; as appears by an official copy of the said indictment, marked exhibit No. 4, which this respondent begs leave to make part of this his answer.

On Wednesday, the 28th day of the same month, May 1800, Philip Norbonne Nicholas, esq. now attorney general of the state of Virginia, and George Hay, esq. now district attorney of the United States, for the district of Virginia, appeared in the said circuit court as counsel for the said Callender: and on Tuesday the 3d of June following, his trial commenced, before this respondent, and the said Cyrus Griffin, who then sat as assistant judge.—The petit jurors being called over, eight of them appeared, namely, Robert Gamble, Bernard Mackham, John Barrel, William Austin, William Richardson, Thomas Tinsley, Matthew Harvey and John Basset; who as they came to the book to be sworn, were severally asked on oath, by direction of the court, "whether they had ever formed and delivered any opinion respecting the subject matter then to be tried, or concerning the charges contained in the indictment?" They all answered in the negative, and were sworn in cheif to try the issue. The counsel for the said Callender declaring, that it was unnessary to put this question to the other four jurymen, William Mayo, James Hays, Henry S. Shore and john Prior, they also were immediately sworn in cheif. No challenge was made by the said Callender or his counsel, to any of these jurors; but the said counsel declared, that they would rely on the answer that should be given by the said jurors to the question thus put by order of the court.

After the abovementioned John Basset, whom this respondent supposes and admits to be the person mentioned in the article of impeachment now under consideration, had thus answered in the negative, to the question put to him by order of the court, as above mentioned, which this respondent states to be the legal and proper question, to be put to jurors on such occasions, he expressed to the court, his wish to be excused from serving on the said trial, because he had made up his mind, or had formed his opinion, "that the publication, called "The Prospect before Us," from which the words charged in the indictment as libellous, where said to be extracted, but which he had never seen, was, according to the representation of it, which he had received, within the sedition law." But the court did not consider this declaration by the said John Basset, as a sufficient reason for withdrawing him from the jury, and accordingly directed him to be sworn in chief.

In this opinion and decision, as in all the others delivered during the trial in question, this respondent concurred with his colleague, the aforementioned Cyrus Griffin, in whom none of these opinions have been considered as criminal. He contends that the opinion itself was legal and correct; and he denies that he concurred in it, under the influence of any "spirit of persecution and injustice," or with any "intent to oppress and procure the conviction of the prisoner;" as is most untruly alledged by the second article of impeachment. His reasons were correct and legal. He will submit them with confidence to this honorable court; which, although it cannot condemn him for an incorrect opinion, proceeding from an honest error in judgment, and ought not to take on itself the power of enquiring into the correctness of his decisions, but merely that of examining the purity of his motives; will, nevertheless weigh his reasons, for the purpose of judging how far they are of sufficient force, to justify a belief that they might have appeared satisfactory to him. If they might have so appeared, if the opinion which he founded on them be not so palpably and glaringly wrong, as to carry with it internal evidence of corrupt motives, he cannot in delivering it have commited an offence.

This honorable court need not be informed, that it is the duty of courts before which criminal trials take place, to prevent jurors from being excused for light and insufficient causes. If this rule were not observed, it would follow, that as serving on such trials as a juror, is apt to to be a very disagreeable business, especially to those best qualified for it, there would be a great difficulty, and often an impossiblility, in finding proper juries. The law has therefore established a fixed and general rule on this subject, calculated not to gratify the wishes or the unreasonable scruples of jurors, but to secure to the party accused, as far as in the imperfection of human nature it can be secured, a fair

and impartial trial. The criterion established by this rule is, "that the juror stands indifferent between the government and the person accused, as to the matter *in issue*, on the indictment." This indifference is always, according to a well known maxim of law, to be presumed, unless the contrary appear; and the contrary may be alledged by way of excuse by the juror himself, or by the prisoner by way of challenge. Even if not alledged, it may be enquired into by the court of its own mere motion, or on the suggestion of the prisoner, and it may be established by the confession of the juror himself, on oath, or by other testimony.

But in order to shew that a juror does not "stand indifferent between the accuser and the accused, *as to the matter in issue*," it is not sufficient to prove that he has expressed a general opinion, "that such an offence as that charged by the indictment ought to be punished;" or "that the party accused, if guilty of the offence charged against him, ought to be punished;" or that a book, for printing and publishing which the party is indicted, comes within the law on which the indictment is founded." All these are general expressions of opinion, as to the criminality of an act of which the party is accused, and of which he *may* be guilty; not declarations of an opinion that he actually is guilty of the offence with which he stands charged. It is impossible for any man in society to avoid having, and extremely difficult for him to avoid expressing, an opinion, as to the criminality or innocence of those acts, which for the most part, are the subjects of indictments for offences of a public nature; such as treason, sedition, and libels against the government. Such acts always engage public attention, and become the subject of public conversation: and if to have formed or expressed an opinion, as to the general nature of those acts, were a sufficient ground of challenge to a juror, when alledged against him, or of excuse from serving when alledged by himself, it would be in the power of almost every offender, to prevent a jury from being impannelled to try him, and of almost every man, to exempt himself from the unpleasant task of serving on such juries. The magnitude & henious nature of an offence, would give it a greater tendency to attract public attention, & to draw forth public expressions of indignation; & would thus encrease its chance of impunity.

To the present case this reasoning applies with peculiar force. The "Prospect before Us" is a libel so profligate and atrocious, that it excited disgust and indignation in every breast not wholly depraved. Even those whose interest it was intended to promote, were, as this respondent has understood and believes, either so much ashamed of it, or so apprehensive of its effects, that great pains were taken by them to withdraw it from public and general circulation. Of such a publication, it must have been extremely difficult to find a man of sufficient character and information to serve on a jury, who had not formed an opinion, either from his own knowledge, or from report. The juror in the present case had expressed no opinion. He had formed no opinion as to the facts. He had never seen the "Prospect before Us," and therefore could have formed no fixed or certain opinion about its nature or contents. They had been reported to him, and he had formed an opinion that if they were such as reported, the book was within the scope and operation of a law for the punishment of "false, scandalous and malicious libels, against the President in his official capacity, written or published with intent to defame him." And who is there, that having either seen the book or heard of it, had not necessarily formed the same opinion.

But this juror had formed no opinion about the guilt or innocence of the party accused; which depended on four facts wholly distinct from the opinion which he had formed. First, whether the contents of the book were really such as had been represented to him? Secondly, whether they should, on the trial, be proved to be true? Thirdly, whether the party accused was really the author or publisher of this book? And fourthly, whether he wrote or published it "with intent to defame the President, or to bring him into contempt or disrepute, or to excite against him the hatred of the good people of the United States?" On all these questions, the mind of the juror was perfectly at large, notwithstanding the opinion which he had formed. He might, consistently with that opinion, determine them all in the negative; and it was on them that the issue between the United States and James Thompson Callender depended. Consequently, this juror, notwithstanding the opinion which he had thus formed, did stand indifferent as

to the matter in issue, in the legal and proper sense, and in the only sense in which such indifference can ever exist; and therefore his having formed that opinion, was not such an excuse as could have justified the court in discharging him from the jury.

That this juror did not himself consider this opinion as an opinion respecting the "matter in issue," appears clearly from this circumstance, that when called upon to answer on oath, "whether he had expressed any opinion as to the matter in issue?" he answered that he had not. Which clearly proves that he did not regard the circumstance of his having formed this opinion, as a legal excuse, which ought to exempt him of right from serving on the jury; but merely suggested it as a motive of delicacy, which induced him to wish to be excused. To such motives of delicacy, however commendable in the persons who feel them, it is impossible for courts of justice to yield, without putting it in the power of every man, under pretence of such scruples, to exempt himself from those duties which all the citizens are bound to perform. Courts of justice must regulate themselves by legal principles, which are fixed and universal, not by delicate scruples, which admit of endless variety, according to the varying opinions and feelings of men.

Such were the reasons of this respondent, and he presumes of his colleague the said Cyrus Griffin, for refusing to excuse the said John Basset from serving on the jury above mentioned. These reasons, and the decision founded on them, he insists were legal and valid. But if the reasons should be considered as invalid, and the decision as erroneous, can they be considered as so clearly and flagrantly incorrect, as to justify a conclusion that they were adopted by this respondent, through improper motives? are not these reasons sufficiently strong, or sufficiently plausible, to justify, a candid and liberal mind in believing, that a judge might honestly have regarded them as solid? Has it not been conceded, by the omissions to prosecute judge Griffin for his decision, that his error, if he committed one, was an honest error? Whence this distinction between this respondent and his colleague? And why is that opinion imputed to one as a crime, which in the other is considered as innocent?

And the said Samuel Chase; for plea to the said second article of impeachment saith, that he is not guilty of any high crime or misdemeanor, as in and by the said second article is alledged against him; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The third article of impeachment alledges that this respondent "with intent to oppress and procure the conviction of the prisoner, did not permit the evidence of John Taylor, a material witness in behalf of the said Callender, to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges, contained in the indictment, although the said charge embraced more than one fact."

In answer to this charge, this respondent begs leave to submit the following facts and observations:

The indictment against James Thompson Callender, which has been already mentioned, and of which a copy is exhibited with this answer, consisted of two distinct and separate counts, each of which contained twenty distinct and independent charges, or sets of words. Each of those sets of words was charged as a libel against John Adams, as President of the United States—and the twelfth charge embraced the following words, "He (meaning president Adams) was a professed aristocrat; he proved faithful and serviceable to the British interest." The defence set up was confined to this charge, and was rested upon the truth of the words. To the other nineteen charges, no defence of any kind was attempted or spoken of, except such as might arise from the supposed unconstitutionality of the sedition law; which if solid, applied to the twelfth charge, as well as to the other nineteen. It was to prove the truth of these words, that John Taylor, the person mentioned in the articles of impeachment now under consideration, was offered as a witness. It can hardly be necessary to remind this honorable court, that when an indictment for a libel contains several distinct charges, founded on distinct sets of words, the party accused, who in such cases is called the "traverser, must be convicted, unless he makes a sufficient defence against every charge. His innocence on one, does not prove him innocent on the others. If the

sedition law should be considered as unconstitutional, the whole indictment, including this twelfth charge, must fall to the ground, whether the words in question were proved to be true or not. If the law should be considered as constitutional, then the traverser, whether the words in the twelfth charge were proved to be true or not, must be convicted on the other nineteen charges, against which no defence was offered. This conviction on nineteen charges, would put the traverser as completely in the power of the court by which the amount of the fine and term of the imprisonment were to be fixed, as a conviction upon all the twenty charges. The imprisonment could not exceed two years, nor the fine be more than two thousand dollars. If then this respondent were desirous of procuring the conviction of the traverser, he was sure of his object, without rejecting the testimony of John Taylor. If his temper towards the traverser were so vindictive, as to make him feel anxious to obtain an opportunity and excuse for inflicting on him the whole extent of punishment permitted by the law, still a conviction on nineteen charges afforded this opportunity and excuse, as fully as a conviction on twenty charges. One slander more or less, in such a publication as the "Prospect before Us," could surely be of no moment. To attain this object, therefore, it was not necessary to reject the testimony of John Taylor.

That the court did not feel this vindictive spirit, is clearly evinced by the moderation of the punishment, which actually was inflicted on the traverser, after he was convicted of the whole twenty charges. Instead of two thousand dollars, he was fined only two hundred, and was sentenced to only nine months imprisonment, instead of two years. And this respondent avers, that he never felt or expressed a wish to go further; but that in this decision, as well as in every other given in the course of the trial, he fully and freely concurred with his colleague, Judge Griffin.

As a further proof that his rejection of this testimony did not proceed from any improper motive, but from a conviction in his mind that it was legally inadmissible and that it was, therefore his duty to reject it, he begs leave to state, that he interfered, in order to prevail on the district attorney to withdraw his objection to those questions, and consent to their being put; which that officer refused to do, on the ground "that he did not feel himself at liberty to consent to such a departure from legal principles.

Hence appears the utter futility of a charge, which attributes to this respondent a purpose as absurd as it was wicked; and without the slightest proof, imputes to the worst motives in him the same action, which in his colleague is considered as free from blame. But this respondent will not content himself with shewing, that his conduct in concurring with his colleague in the rejection of John Taylor's testimony, could not have proceeded from the motives ascribed to him; but he will shew that this rejection, if not strictly legal & proper, as he believes and insists that it is, rests on legal reasons of sufficient force to satisfy every mind, that a judge might have sincerely considered it as correct.

The words stated as the ground of the twelfth charge above mentioned, are stated in the indictment as one entire and indivisible paragraph, constituting one entire offence. This respondent considered them at the trial, and still considers them, as constituting one entire charge, and one entire offence; and that they must be taken together in order to explain and support each other. It is clear that no words are indictable as libellous, except such as expressly, or by plain implication, charge the person against whom they are published, with some offence either legal or moral. To be an "aristocrat," is not in itself an offence, either legal or moral, even if it were a charge susceptible of proof; neither was it an offence either legal or moral, for Mr. Adams to be "faithful and serviceable to the British interest," unless he thereby betrayed or endangered the interests of his own country; which does not necessarily follow, and is not directly alledged in the publication. These two phrases, therefore, taken separately, charge Mr. Adams with no offence of any kind; and, consequently, could not be indictable as libellous: but taken together, they convey the implication that Mr. Adams, being an "aristocrat," that is, an enemy to the republican government of his own country, had subserved the British interest, against the interest of his own country; which would, in his situation, have been an offence both moral and legal; to charge him with it was, therefore, libellous.

Admitting, therefore, these two phrases to constitute one distinct charge, and one entire offence, this respondent considers and states it to be law, that no justification

which went to part only of the offence, could be received. The plea of justification must always answer the whole charge, or it is bad on the demurrer; for this plain reason, that the object of the plea is to shew the party's innocence; and he cannot be innocent, if the accusation against him be supported in part. Where the matter of defence may be given in evidence, without being formally pleaded, the same rules prevail. The defence must be of the same nature, and equally complete, in one case as in the other. The only difference is in the manner of bringing it forward. Evidence, therefore, which goes only to justify the charge in part, cannot be received. It is not indeed necessary, that the whole of this evidence should be given by one witness. The justification may consist of several facts, some of which may be proved by one person, and some by another. But proof, in such cases, must be offered as to the whole, or it cannot be received.

In the case under consideration, no proof was offered as to the whole matter contained in the twelfth article. No witness except the above mentioned John Taylor, was produced or mentioned. When a witness is offered to a court and jury, it is the right and duty of the court, to require a statement of the matters intended to be proved by him. This is the invariable practice of all our courts, and was done most properly by this respondent and his colleague, on the occasion in question. From the statement given by the traverser's counsel, of what they expected to prove by the said witness, it appeared that his testimony could have no possible application to any part of the indictment, except the twelfth charge above mentioned, and but a very weak and imperfect application even to that part. The court, therefore, as it was their right and duty, requested that the questions intended to be put to the witness, should be reduced to writing, and submitted to their inspection; so as to enable them to judge more accurately, how far those questions were proper and admissible. This being done, the questions were of the following tenor and effect:

1st. "Did you ever hear Mr. Adams express any sentiments favorable to monarchy, or "aristocracy," and what were they?"

2d. "Did you ever hear Mr. Adams, while vice-president, express his disapprobation of the funding system?"

3d. "Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain?"

The second question, it is manifest, had nothing to do with the twelfth charge; for Mr. Adam's approbation or disapprobation of the funding system, could not have the most remote tendency to prove that he was an aristocrat, or had proved faithful and serviceable to the British interest. In that part of the publication which furnishes the matter of the thirteenth charge in the indictment, it is indeed stated, that Mr. Adams, "when but in a secondary station censured the funded system," but those words are in themselves wholly immaterial; and no attempt was made, nor any evidence offered or spoken of, to prove the truth of the other matter contained in the thirteenth charge. It was from their connection with that other matter, that these words could alone derive any importance; and consequently their truth or falshood was altogether immaterial, while that other matter remained unproved. This question, therefore, which went solely to those immaterial words, was clearly inadmissible. The third question was in reality, as far as the second from any connection with the matter in issue, although its irrelevancy is not quite so apparent. Mr. Adam's having voted against the two measures alluded to in that question, if he did in fact vote against them, could by no means prove that he was "faithful and serviceable to the British interest," in any sense, much less with those improper and criminal views, with which the publication in question certainly meant to charge him. He might, in the honest and prudent performance of his duty towards his government and his country, incidentally promote the interests of another country; but it was by no means competent for a jury to infer from thence, that he was "faithful" to that other country, or, in other words, that he held the interests of that other country chiefly in view, and was actuated in giving his vote by a desire to promote them, independently of, or without regard to the interests of his own country. Such an inference could not be made from the fact, admitting it to be true. The fact, if true, was *no* evidence to support such an inference, therefore the fact was immaterial; and as it is the province and duty of the

court, in such circumstances, to decide on the materiality of facts offered in evidence, it follows clearly, that it was the right and duty of the court, in this instance, to reject the third question; an affirmative answer to which could have proved nothing in support of the defence.

The first question, therefore, and the only remaining one proposed to be put to this witness, stood alone; and an affirmative answer to it if it could have proved any thing, could have proved only a part of the charge; namely, that Mr. Adams was an aristocrat. But evidence to prove a part only of an entire and indivisible charge, was inadmissible for the reasons stated above.

If, on the other hand, the phrase in question, "that Mr. Adams was an aristocrat," that "he had proved faithful and serviceable to the British interest," were distinct and divisible, and constituted two distinct charges, which may perhaps be the proper way of considering them, still the above mentioned questions were improper and inadmissible, in that point of view.

The first charge in that case is, that Mr. Adams "was an aristocrat." To be an aristocrat, even if any precise and definite meaning could be affixed to the term, is not an offence either legal or moral; consequently, to charge a man with being an aristocrat is not a libel; and such a charge in an indictment for a libel, is wholly immaterial. Nothing is more clear, than that immaterial matters in legal proceedings ought not to be proved, and need not be disproved. In the next place, the term "aristocrat" is one of those vague indefinite terms, which admit not of precise meaning, and are not susceptible of proof. What one person might consider as aristocracy, another would consider as republicanism, and a third as democracy. If indictments could be supported on such grounds, the guilt or innocence of the party accused, must be measured, not by any fixed or known rule, but by the opinions which the jurors appointed to try him might happen to entertain, concerning the nature of aristocracy, democracy, or republicanism. And, lastly, the question itself was as vague, and as void of precise meaning, as the charge of which it was intended to furnish the proof. The witness was called upon to declare "whether he had heard Mr. Adams express any and what opinions favorable to aristocracy or monarchy?" How was it to be determined, whether an opinion was favorable to aristocracy or monarchy? One man would think it favourable and another not so, according to the opinions which they might respecively entertain, on political subjects. The first question, therefore, was inconclusive, immaterial and inadmissible.

The second, as has already been remarked, was wholly and manifestly foreign from the matter in issue. Mr. Adam's dislike of the funding system, if he did in fact dislike it, had nothing to do with his aristocracy or his faithfulness to the British interest. There is no pretence for saying, that such a question ought to have been admitted.

As to the third, "whether Mr. Adams had not voted against the sequestration of British property, and the suspension of commercial intercourse with Great Britain," it has already been shewn to be altogether improper; on the ground that such votes, if given by Mr. Adams, were no evidence whatever of his having been "faithful and serviceable to the British interest." If he had been so, provided it were, in his opinion, at the same time useful to the interests of his own country, which it well might be, and the contrary of which is not alledged by this part of the publication, taken separately, it was no offence of any kind; and to charge him with it was not a libel. The charge was, therefore, immaterial and futile, and no evidence for or against it could properly be received. And, finally, if the charge had been material, and the giving of these votes had been legal evidence to prove it, that fact was on record in the journals of the Senate, and might have been proved by that record, or an official copy of it. As this evidence was the highest of which the case admitted, no inferior evidence of it, such as moral proof is well known to be, could be admitted.

For these reasons this respondent did concur with his colleague, the said Cyrus Griffin, in rejecting the three above mentioned questions; but not any other testimony that the said John Taylor might have been able to give. In this he insists that he acted legally and properly, according to the best of his ability. If he erred, it is impossible, for the reasons stated by him in the beginning of his answer to this article, to suppose that he erred wilfully; since he could have had no possible motive for a piece of misconduct so shameful, and at the same time so well calculated to give offence. In a point

so liable to misapprehension and misrepresentation, and so likely to be used as a means of exciting public odium against him, it is far more probable, that had he been capable of bending his opinion of the law to other motives he would have admitted illegal testimony; which, taken in its utmost effect, could have had no tendency to thwart those plans of vengeance against the traverser, under the influence of which he is supposed to have acted.

If his error was an honest one, which as his colleague also fell into it, might in charity be supposed; and as there is not a shadow of evidence to the contrary, must in law be presumed; he cannot, for committing it, be convicted of any offence, much less a high crime and misdemeanor, for which he must, on conviction, be deprived of his office.

And for plea to the said third article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor, as in and by the said third article as alledged against him; and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The fourth article of impeachment alledges, that during the whole course of the trial of James Thompson Callender, above mentioned, the conduct of this respondent was marked by "manifest injustice, partiality and intemperance:" and five particular instances of the "injustice, partiality and intemperance" are adduced.

The first consists, "in compelling the prisoner's counsel to reduce to writing and submit to the inspection of the court for their admission or rejection all questions which the said counsel meant to propound to the abovementioned John Taylor, the witness."

This respondent, in answer to this part of the article now under consideration, admits that the court, consisting of himself and the above mentioned Cyrus Griffin, did require the counsel for the traverser, on the trial of James Thompson Callender above mentioned, to reduce to writing the questions which they intended to put to the said witness. But he denies that it is more his act than the act of his colleague, who fully concurred in this measure. The measure as he apprehends and insists, was strictly legal and proper; his reason for adopting it, and he presumes those of his colleague, he will submit to this honorable court, in order to shew that if he, in common with his colleague, committed an error it was an error into which the best and the wisest men might have honestly fallen.

It will not be denied and cannot be doubted, that according to our laws, evidence, whether oral or written, may be rejected and prevented from going before the jury, on various grounds—1st. For incompetency; where the source from which the evidence is attempted to be drawn, is an improper source; as if a witness were to be called who was infamous, or interested in the event of the suit; or a paper should be offered in evidence, which was not between the same parties, or was not executed in the forms prescribed by law. 2d For irrelevancy; when the evidence offered is not such, as in law will warrant the jury to infer the fact, intended to be proved; or where that fact, if proved is immaterial to the issue. For these reasons, and perhaps for others which might be specified, evidence may properly be rejected in trials before our courts.

As little can it be doubted, that according to our laws, the court and not the jury is the proper tribunal for deciding all questions relative to the admissibility of evidence. The effect of the evidence when received, is to be judged of by the jury; but whether it ought to be received, must be determined by the court. This arises from the very constitution of the trial by jury; one fundamental principle which is, that the jury must decide the case, not according to vague notions, secret impressions or general belief, but according to legal and proper evidence, delivered in court. So strictly is this rule observed, that if one juror have any knowledge of the matter in dispute, it may influence his own judgment, but not that of his fellow jurors, unless he state it to them on oath in open court; and nothing is more common than for our courts, after all the evidence which the party can produce has been offered and received, to tell the jury that there is no evidence to support the claim, or the defence; or when proof is offered of a certain fact, to determine that such fact is not proper to be given in evidence.

Hence it results, and is every day's practice, that when a witness is produced, or a writing is offered in evidence, the opposite party having a right to object to the evidence if he should think it impro-

per, requires to be informed what the witness is to prove or to see the writing before the first is examined or the second is read to the jury. The court has the same right, resulting necessarily from its power to decide all questions relative to the admissibility of evidence. This right our courts are in the constant habit of exercising: not only when objections are made by the parties, but when there being no objection, the court itself has reason to suspect that the testimony is improper. In most cases, but not in all, consent by the opposite party removes all objections to the admissibility of evidence, and courts sometimes infer consent from silence; but as it is their duty to take care, that no improper or illegal evidence goes to the jury, unless the objection to it be removed by consent of parties: it is consequently their duty, in all cases where they see reason to suspect that the evidence offered is improper, to ascertain whether consent has been given, or whether the seeming acquiescence of the opposite party has proceeded from inattention. This is more particularly their duty in *criminal* cases, where they are bound to be counsel for the government, as well as for the party accused.

It being thus the right and duty of a court before which a trial takes place, to inform itself of the nature of the evidence offered, so as to be able to judge whether such evidence be proper, it results necessarily that they have a right to require, that any question intended to be put to a witness, should be reduced to writing; for that is the form in which their deliberation upon it may be most perfect, and their judgment will most likely to be correct. In the case now under consideration, the court did exercise this right. When the testimony of John Taylor was offered, the court enquired of the traverser's counsel what that witness was to prove. The statement of his testimony given in answer, induced the court to suspect that it was irrelevant and inadmissible. They therefore, that they might have an opportunity for more careful and accurate consideration, called upon the counsel to state in writing, the questions intended to be put to the witness.

This is the act done by the court, but concurred in by the respondent, which has been selected and adduced, as one of the proofs and instances of "manifest injustice, partiality, and intemperance" on his part. He owes an apology to this honorable court, for having occupied so much of its time with the refutation of a charge which has no claim to serious consideration, except what it derives from the respect due to the honorable body by which it was made and the high character of the court where it is preferred.

The next circumstance stated by the article now under consideration, as an instance and proof of "manifest injustice, partiality, and imtemperance" in this respondent, is his refusal to postpone the trial of the said James Thomson Callender, "although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused, and although it was manifest that with the utmost diligence, the attendance of such witnesses could not have been procured at that term."

This respondent, in answer to this part of the charge, admits, that in the above mentioned trial, the traverser's counsel did move the court, while this respondent sat in it alone, for a continuance of the case until the next term; not merely a postponement of the trial as the expressions used in this part of the article would seem to import; and did file as the ground work of their motion, an affidavit of the traverser, a true and official copy of which, marked exhibit No. 5, this respondent herewith exhibits and begs leave to make part of this answer; but he denies that any sufficient ground for a continuance until the next term, was disclosed by this affidavit: as he trusts will clearly appear from the following facts and observations.

The trial of an indictment at the term when it is found by the grand jury, is a matter of course, which the prosecutor can claim as a right unless legal cause can be shewn for a continuance. The prosecutor may consent to a continuance, but if he withholds his consent, the court cannot grant a continuace without legal cause. Of the sufficiency and legality of this cause, as of every other question of law, the court must judge; but it must decide on this as on every other point, according to the fixed and known rules of law.

One of the legal grounds, and the principal one on which such a continuance may be granted, is the absence of competent and *material* witnesses, whom

the party cannot produce at the present term, but has a *reasonable ground* for expecting to be able to produce at the next term. Analagous to this, is the inability to procure at the present term, legal and *material* written testimony, which the party has a *reasonable expectation* of being able to procure at the next term.

These rules are as reasonable and just in themselves, as they are essential to the due administration of justice, to the punishment of offences on the one hand, and to the protection of innocence on the other. If the continuance of a cause, on the application of the party accused, were a matter of right, it is manifest that no indictment would be brought to trial until after a delay of many months. If, on the other hand, the granting of a continuance depended not on fixed rules, but on the arbritrary will of the court, it would follow that weakness or partiality might induce a court, on some occasions, to extend a very improper indulgence to the party accused; while on others, passion or prejudice might deprive him of the necessary means of making his defence. Hence the necessity of fixed rules, which the judges are bound to expond and apply, under the solemn sanction of their oath of office.

The true and only reason for granting a continuance is, that the party accused may have the best opportunity that the law can afford to him, of making his defence. But incompetent or immaterial witnesses, could not be examined if they were present; and consequently, their absence can deprive the party of no opportunity which the laws afford to him, of making his defence. Hence the rule, that the witnesses must be competent and material.

Public justice will not permit the trial of offenders to be delayed, on light or unfounded pretences. To wait for testimony, which the party really wished for, but did not expect to be able to produce within some definite period, would certainly be a very light pretence; and to make him the judge, how far there was reasonable expectation of obtaining the testimony within the proper time, would put it in his power to delay the trial, on the most unfounded pretences. Hence the rule, that there must be reasonable ground of expectation, in the judgement of the court, that the testimony may be obtained within the proper time.

It is therefore a settled and most necessary rule, that every application for a continuance, on the ground of obtaining testimony, must be supported by an affidavit, disclosing sufficient matter to satisfy the court, that the testimony wanted "is competent and material," and that there is "reasonable expectation of procuring it within the time prescribed." From a comparison of the affidavit in question with the indictment, it will soon appear how far the traverser in this case, brought himself within this rule.

The absent witnesses, mentioned in the affidavit, are William Gardner, of Portsmouth, in New Hampshire; Tench Coxe, of Philadelphia, in Pennsylvania; Judge Bee, of some place in South Carolina; Timothy Pickering, lately of Philadelphia, in Pennsylvania, but of what place at that time, the deponent did not know; William B. Giles, of Amelia county, in the state of Virginia; Stephens Thompson Mason, whose place of residence is not mentioned in the affidavit, but was known to be in Loudon county, in the state of Virginia; and General Blackburn, of Bath county, in said state. The affidavit also states, that the traverser wished to procure, as material to his defence, authentic copies of certain answers made by the President of the United States, Mr. Adams, to addresses from various persons; and also, a book entitled "an Essay on Canon and Feudal Law," or entitled in words *to that purport*, which was ascribed to the President, and which the traverser believed to have been written by him; and also evidence to prove that the President was in fact, the author of that book.

It is not stated, that the traverser had any reasonable ground to expect, or did expect to procure this book or evidence, or these authentic copies, or the attendance of any one of these witnesses, at the *next* term. Nor does he attempt to shew in what manner the book, or the copies of answers to addresses, were material, so as to enable the court to form a judgment on that point. Here then, the affidavit was clearly defective. His believing the book and copies to be material, was of no weight, unless he shewed to the court, sufficient grounds for entertaining the same opinion. Moreover he does not state, where he supposes that this book, and those authentic copies may be found: so as to enable the court to judge, how far a reasonable expectation

of obtaining them, might be entertained. On the ground of this book and these copies, therefore, there was no pretence for a continuance. As to the witnesses, it is manifest, that, from their very distant and dispersed situation, there existed no ground of reasonable expectation, that their attendance could be procured at the *next* term, or at any subsequent time. Indeed, the idea of postponing the trial of an indictment, till witnesses could be convened at Richmond, from South Carolina, New Hampshire, and the western extremities of Virginia, is too chimerical to be seriously entertained. Accordingly the traverser, though in his affidavit he stated them to be material, and declared that he could not procure their attendance at that term, could not venture to declare on oath, that he expected to procure it at the next, or at any other time ; much less that he had any reasonable ground for such expectation. On this ground, therefore, the affidavit was clearly insufficient : and it is consequently the duty of the court to reject such application.

But the testimony of these witnesses, as stated in the affidavit, was wholly immaterial ; and therefore, their absence was no ground for a continuance, had there been reasonable ground for expecting their attendance at the next term.

William Gardner and Tench Coxe, were to prove, that Mr. Adams had turned them out of office, for their political opinions or conduct. This applied to that part of the publication, which constituted the matter of the third charge in the indictment, in these words, " the same system of persecution extended all over the continent. Every person holding an office, must either quit it or think and vote exactly with Mr. Adams." —Judge Bee, was to prove, that Mr. Adams had advised and requested him by letter, in the year 1799, to deliver Thomas Nash, otherwise called Jonathan Robins, to the British consul, in Charleston. This might have had some application to the matter of the seventh charge ; which alledged that "the hands of Mr. Adams, were reeking with the blood of the poor, friendless, Connecticut sailor." Timothy Pickering was to prove, that Mr. Adams, and while Congress was in session, was many weeks in possesion of important dispatches, from the American minister in France, without communicating them to Congress. This testimony was utterly immaterial ; because, admitting the fact to be so, Mr. Adams was not bound, in any respect, to communicate those dispatches to Congress, unless in his discretion, he should think it necessary ; and also, because, if true, had no relation to any part of the indictment. There are, indeed, three charges, on which it might at first sight seem to have some slight bearing. These are the eighth, the word, furnishing the matter of which are, " every feature in the administration of Mr. Adams, forms a distinct and additional evidence, that he was determined at all events, to embroil this country with France ;"the fourteenth, the words stated in which, alledges, that " by sending these ambassadors to Paris, Mr. Adams and his British faction, designed to do nothing but mischief," and the eighteenth, the matter of which states, " That in the midst of such a scene of profligacy and usury, the President persisted as long as he durst, in making his utmost efforts, for provoking a French war." To no other charge in the indictment, had the evidence of Timothy Pickering, as stated in the affidavit, the remotest affinity. And surely, it will not be pretended by any man, who shall compare this evidence, with the three charges above mentioned ; that the fact intended to be proved by it, furnished any evidence proper to go to a jury, in support of either of those charges, that " every feature of his administration, formed a distinct and additional evidence, of a determination at all events, to embroil this country with France," that " in sending ambassadors to Paris, he intended nothing but mischief," that " in the midst of a scene of profligacy and usury, he persisted, as long as he durst, in making his utmost efforts for provoking a French war," are charges, which surely cannot be supported or justified by the circumstances of his " keeping in his possession for several weeks, while Congress was in session, dispatchs from the American minister in France, without communicating them to Congress," which he was not bound to do, and which it was his duty not to do, if he supposed that the communication, at an earlier period, would be injurious to the public interest The testimony of William B. Giles and Stephens Thompson Mason, was to prove, that Mr. Adams had ut-

tered in their hearing, certain sentiments, favorable to aristocratic or monarchical principles of government.

This has no reference except to a part of the twelfth charge; which has been already shewn to be wholly immaterial if taken separately, and wholly incapable of a separate justification, if considered as part of an entire charge. And, lastly, it was to be proved by gen. Blackburn, that in his answer to an address, Mr. Adams avowed, "that there was a party in Virginia, which served to be humbled into dust and ashes, before the indignant frowns of their injured, insulted and offended country." There were but two charges in the indictment to which this fact, if true, had the most distant resemblance.—These are the fifteenth and sixteenth, the words forming the matter of which, call Mr. Adams "an hoary-headed libeller of the governor of Virginia, who with all the fury, but without the propriety or sublimity of Homer's Achilles, bawled out, to arms, then, to arms!" and "who floating on the bladder of popularity threatened to make Richmond the centre point of a bonfire." It would be an abuse of the patience of this honorable court, to occupy any part of its time in proving, that the fact intended to be proved by general Blackburn, could not in the slightest degree support or justify such charges as these. This is the account given of the testimony of the absent witnesses, by the affidavit filed as the ground of the motion for a continuance. From a comparison of it with the indictment, it will appear that out of twenty charges in the indictment, there were but eight, to which any part of the testimony of these witnesses had the most distant allusion; and that of those eight charges there are five, which the testimony, having some allusions to them, could not in the slightest degree support.—Twelve charges therefore, remained without even an attempt to justify them; and seventeen were wholly destitute of any legal or sufficient justification. On these seventeen charges, therefore, the traverser must have been convicted; even if the remaining three had been completely justified by the testimony of the absent witnesses. The conviction on these seventeen charges, or even on one of them, would have put it into the power of the court to fine and imprison the traverser, to the whole extent allowed by the law. If the truth of these three charges, admitting it to be established, could have any effect in mitigating the punishment, which depended on the court and not on the jury, the court in passing sentence might make, and in this case, actually did make, the fullest abatement on that account that the testimony it adduced would warrant.

This testimony, therefore, was in every view immaterial; and had it been material, there existed no ground of reasonable expectation, that it could be obtained at the next term or any future term. For these reasons, and not from those criminal motives, which without the least shadow of proof are ascribed to him, this respondent did overrule and reject the motion for a continuance till the next term: as it was his duty to do, since he had no discretion in the case, but was bound by the rules of law.

But in order to afford every accommodation to the traverser and his counsel, which it was in his power to give, this respondent did offer to postpone the trial for a month or more, in order to afford them full time for preparation, and for procuring such testimony as was within their reach. This indulgence they thought proper to refuse.

On Monday, the second, and Tuesday, the 3d day of June, 1800, when Judge Griffin had taken his seat in court, and was on the bench, the counsel for the traverser, renewed their motion for a continuance, founded on the same affidavit; and after a full hearing and consideration of the argument, the court, judge Griffin concurring, overruled the motion, and ordered the trial to proceed.

If this decision be correct, as he believe and insists that it is, no offence could be committed by him in making or concurring in it. It was a proper and legal performance of his duty as a judge. If it be erroneous, still the error, if an honest one, cannot be an offence, much less a high crime and misdemeanor; and as in his colleague it has been considered as an honest error, he confidently trust it will be considered so in him also.

To the third charge adduced in support of the article now under consideration, the charge of using "unusual, rude and contemptuous expressions, towards the prisoner's counsel," and of "falsely insinuating, that they wished to excite the public fears and indignation, and to produce that in subordination to law, to which the conduct of this respondent did manifestly

tend," he cannot answer otherwise than by a general denial. A charge so vague, admits not of precise or particular refutation. He denies that there was any thing unusual or intentionally rude or contemptuous in his conduct or his expressions towards the prisoner's counsel; that he made any false insinuation whatever against them, or that his own conduct tended in any manner to produce insubordination to law. On the contrary, it was his wish and intention, to treat the counsel with the respect due to their situation and functions, and with the decorum due to his own character. He thought it his duty to restrain such of their attempts as he considered improper, and to overrule motions made by them, which he considered as unfounded in law; but this it was his wish to accomplish in the manner least likely to offend, from which every consideration concurred in dissuading him. He did indeed think at that time, and still remains under the impression, that the conduct of the traverser's counsel, whether from intention or not he will not undertake to say was disrespectful, irritating, and highly incorrect. That conduct which he viewed in this light, might have produced some irritation in a temper naturally quick and wram, and that this irritation might, notwithstanding his endeavors to suppress it, have appeared in his manner and in his expressions, he thinks not improbable; for he has had occasions of feeling and lamenting the want of sufficient caution and self-command, in things of this nature. But he confidently affirms, that his conduct in this particular was free from intentional impropriety; and this respondent denies, that any part of his conduct was such as ought to have induced the traverser's counsel to "abandon the cause of their client," nor does he believe that any such cause did induce them to take that step. On the contrary, he believes that it was taken by them under the influence of passion or for some motive into which this respondent forbears at this time to enquire. And this respondent admits, that the said traverser was convicted and condemned to fine and imprisonment, but not by reason of the abandonment of his counsel; but because the charges against him were clearly proved, and no defence was made or attempted against far the greater number of them.

The fourth charge in support of this article, attributes to this respondent "repeated and vexatious interruptions of the said counsel, which at length induced them to abandon the cause of their client, who was therefore convicted, and condemned to fine and imprisonment." To this charge also, it is impossible to give any other answer but a general denial. He avers that he never interrupted the traverser's counsel vexatiously or except when he considered it his duty to do so. It cannot be denied that courts have power to interrupt counsel, when in their opinion the correctness of proceeding requires it. In this, as in every thing else, they may err. They may sometimes act under the influence of momentary passion or irritation, to which they in common with other men, are liable. But unless their conduct in such cases, though improper or ill-judged, be clearly shewn to proceed, not from human infirmity, but from improper motives, it cannot be imputed to them as an offence, much less as a crime or misdemeanor.

Lastly, this respondent is charged under this article with an "indecent solicitude, manifested by him, for the conviction of the accused, unbecoming even a public prosecutor, by highly disgraceful to the character of a judge, as it was subversive of justice. This is another charge of which it is impossible to give a precise refutation and to a general denial of which, this respondent must therefore confine himself. He denies that he felt any solicitude whatever for the conviction of the traverser; other than the general wish natural to every friend of truth, decorum and virtue, that persons guilty of such offences, as that of which the traverser stood indicted, should be brought to punishment, for the sake of example. He has no hesitation to acknowledge, that his indignation was strongly excited, by the atrocious and profligate libel which the traverser was charged with having written and published. This indignation, he believes, was felt by every virtuous and honorable man in the community, of every party, who had read the book in question, or become acquainted with its contents. How properly it was felt, will appear from the book itself, which this respondent has ready to produce to this honorable court; from the parts of it incorporated into the indictment now under consideration; and from some further extracts contained in the paper marked exhibit No. 6, which this respondent prays leave to make part of

this his answer. He admits, and it can never be to him a subject of self reproach or a cause of regret that he partook largely in this general indignation, but he denies that it in any manner influenced his conduct towards the traverser, which was regulated by a conscientious regard to his duty and the laws. He moreover contends, that a solicitude to procure the conviction of the traverser, however unbecoming his character as a judge, would not have been an offence, had he left it; unless it had given rise to some misconduct on his part. Intentions and feelings, unless accompanied by actions, do not constitute crimes in this country; where the guilt or innocence of men is not judged of by their wishes and solicitudes, but by their conduct and its motives. And this respondent thinks it his duty, on this occasion, to enter his solemn protest against the introduction in this country of those arbitrary principles, at once the offspring and the instruments of despotism, which would make "high crimes and misdemeanors" to consist in "rude and contemptious expressions" in "vexatious interruptions of counsel" and in the manifestation of "indecent solicitude" for the conviction of a most notorious offender. Such conduct is no doubt improper and unbecoming in any person, and much more so in a judge; but it is too vague, too uncertain, and too susceptible of forced interpretations, according to the impulse of passion or the views of policy, to be admitted into the class of punishable offences, under a system of law whose certainty and precision in the definition of crimes, is its greatest glory, and the greatest privilege of those who live under its sway.

In concluding his defence against those charges contained in the fourth article of impeachment, he declares, that his whole conduct in that trial, was regulated by a strict regard to the principles of law, and by an honest desire to do justice between the United States and the party accused. He felt a sincere wish, on the one hand, that the traverser might establish his innocence, by those fair and sufficient means which the law allows; and a determination on the other, that he should not, by subterfuges and frivolous pretences, sport with the justice of the country, and evade that punishment of which, if guilty, he was so proper an object. These intentions, he is confident, were legal and laudable; and if, in any part of his conduct, he swerved from this line, it was an error of his judgment and not of his heart.

And the said respondent for plea to the said fourth article of impeachment, saith, that he is not guilty of any high crime and misdemeanor, as in and by the said fourth article is alledged against him, and this he prays, may be enquired of by this honorable court, in such manner as law and justice shall seem to require.

The fifth article of impeachment charges this respondent, with having awarded "a capias against the body of the said James Thompson Callender, indicted for an offence *not capital*, whereupon the said Callender was arrested and committed to *close* custody, contrary to law in that case made and provided."

This charge is rested, first, on the act of congress of September 24th, 1789, entitled, "an act to establish the judicial courts of the United States," by which it is enacted, "that for any crime or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process, in the state where such offender may be found." And 2dly, on a law of the state of Virginia, which is said to provide, "that upon *presentment* by any grand jury, of an offence *not capital*, the court shall order the clerk to issue a *summons* against the person or persons so offending, to appear and answer such presentment at the *next* court." it is contended, in support of this charge, that the act of congress above mentioned, made the state law the rule of proceeding, and that the state law was violated by issuing a capias against Callender, instead of a summons.

The first observation to be made on this part of the case is, that the date of the law of Virginia is not mentioned in the article. A very material omission! For it cannot be contended, that by the act of congress in question, which was passed for establishing the laws of the United States, and regulating their proceedings it was intended to render these proceedings dependant on all *future* acts of the state legislatures. The intention certainly was, to adopt to a certain limited extent, the regulations existing in the states at the time of passing the act. Consequently, a law of Virginia, passed after this act, can have no operation on the proceedings under it. But by referring to the law of Vir-

ginia, in question, it will be found to bear date on November 13th, 1792, more than three years after this act of congress, by which it is said to have been adopted. But the omission of the date of this law of Virginia, is not the most material oversight which has been made in citing it. Its title is, "An act directing the method of proceeding against free persons, charged with certain crimes, &c." and it enacts, section 28th, "That upon presentment made by the grand jury, of an offence not capital, the court shall order the clerk to issue a summons, or *other proper process*, against the person or persons so presented, to appear and answer at the next court." It will be observed that these words, "or other proper process," which leave it perfectly in the discretion of the court what process shall issue, provided it be such as is proper for bringing the offender to answer to the presentment, are omitted in this article of impeachment.

From these words it is perfectly manifest, that the law of Virginia, admitting it to apply, did not order a summons to be issued, but left it perfectly in the direction of the court to issue a summons, or such other process as they should judge proper.

It is therefore, a sufficient answer to this article to say, that this respondent considered a capias as the proper process, and therefore ordered it to issue; which he admits that he did immediately after the presentment was found against the said Callender, by the grand jury.

This he is informed, and expects to prove, has been the construction of this law by the courts of Virginia, and their general practice. Indeed it would be the most strange, if any other construction or practice had been adopted. There are many offences not capital, which are of a very dangerous tendency, and on which very severe punishment is inflicted by the laws of Virginia; and to enact by law that in all such cases, however notorious or profligate the offenders might be, the courts should be obliged, after a presentment by a grand jury to proceed against them by summons; would be to enact, that as soon as their guilt was rendered extremely probable, by the presentment of a grand jury, they should receive regular notice, to escape from punishment by flight or concealment.

It will also appear, as this respondent believes, by a reference to the laws and practice of Virginia, into which he has made all the enquiries which circumstances and the shortness of time allowed him for preparing his answer, would permit, that all the cases in which a summons is considered as the only proper process, are cases of petty offences, which on the presentment of a grand jury, are to be tried by the court in a summary way, without the intervention of a petit jury. Therefore, these provisions had no application to the case of Callender, which could be no otherwise proceeded on than by indictment, and trial on the indictment by a petit jury.

It must be recollected that the act of Congress of September 24th, 1789, enacts, section 14, "that the courts of the United States, shall have power to issue writs of scire facias, habeas corpus, *and all other writs* not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of laws." Consequently the circuit court, where the proceedings in question took place, had power to issue a capias against the traverser, on the presentment, unless the state law above mentioned governed the case, and contained something to restrain the issuing of that writ in such a case. This respondent contends, for the reasons above stated, that this state law neither applied to the case, nor contained any thing to prevent the issuing of a capias, if it had applied.

Thus it appears that this respondent, in ordering a capias to issue against Callender, decided correctly, as it certainly was his intention to do. But he claims no other merit than that of upright intention in this decision: for when he made the decision, he was utterly ignorant that such a law existed in Virginia; and declares that he never heard of it, till this article was reported by a committee of the House of Representatives during the present session of Congress. This law was not mentioned on the trial either by the counsel or the traverser, or by Judge Griffin, who certainly had much better opportunities of knowing it than this respondent, and who, no doubt, would have cited it had they known it and considered it as applicable to the case. This respondent well knows that in a criminal view, ignorance of the law excuses no man in offending against it —but this maxim applies not to the decision of a judge; in whom ignorance of the law in general would certainly be a disqua-

lification for this office, though not a crime; but ignorance of a particular act of assembly, of a state where he was an utter stranger, must be considered as a very pardonable error; especially as the counsel for the prisoner to whose case that law is supposed to have applied, forbore or omitted to cite it; and as a judge of the state, always resident in it, and long conversant with its local laws, either forget this law, or considered it as inapplicable.

Such is the answer, which this respondent makes to the fifth article of impeachment. If he erred in this case, it was through ignorance of the law, and surely ignorance under such circumstances, cannot be a crime, much less a high crime & misdemeanor, for which he ought to be removed from his office. If a judge were impeachable for acting against law from ignorance only, it would follow, that he would be punished in the same manner for deciding against law wilfully, and for deciding against it through mistake. In other words, there would be no distinction between ignorance and design, between error and corruption.

And the said respondent, for plea to the said fifth article of impeachment, saith that he is not guilty of any high crime and misdemeanor, as in and by the said fifth article is alledged against him; and this he prays, may be enquired of, by this honorable court, in such manner, as law and justice shall seem to them to require.

The sixth article of impeachment alledges that this respondent, "with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial, during the term at which he, the said Callender was presented and indicted, contrary to the law in that case made and provided."

This charge also, is founded, 1st, on the act of Congress of Sept. 24th, 1789, above mentioned, which enacts, section 34, "that the laws of the several states, except where the constitution treaties, or statutes of the United States shall otherwise provide, shall be regarded as the rules of decision, in trials at *common law*, in the courts of the United States, in cases where they apply;" and secondly, on a law of the state of Virginia, which is supposed to provide, "that in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next preceding that, during which such presentment shall have been made." This law, it is contended, is made the rule of decision by the above mentioned act of Congress, and was violated by the refusal to continue the case of Callender till the next term.

In answer to this charge this respondent declares, that he was at the time of making the above mentioned decision, wholly ignorant of any such law of Virginia as that in question, that no such law was adduced or mentioned by the counsel of Callender, in support of their motion for a continuance; neither when they first made it, before this respondent sitting alone; nor when they renewed it, after Judge Griffin had taken his seat in court: that no such law was mentioned by Judge Griffin; who concurred in overruling the motion for a continuance and ordering on the trial; which he could not have done had he known that such a law existed, or considered it as applicable to the case; and that this respondent never heard of any such law, until the articles of impeachment now under consideration were reported, in the course of the present session of Congress, by a committee of the House of Representatives.

A judge is certainly bound to use all proper and reasonable means of obtaining a knowledge of the laws which he is appointed to administer; but after the use of such means, to overlook, misunderstanding, or remain ignorant of some particular law, is at all times a very pardonable error. It is much more so in the case of a judge of the supreme court of the United States, holding a circuit court in a particular state, with which he is a stranger, and with the local laws of which he can have enjoyed but very imperfect opportunities of becoming acquainted. It was foreseen by congress, in establishing the circuit courts of the United States, that difficulties and inconveniencies must frequently arise from this source, and to obviate such difficulties it was provided, that the district judge of each state, who having been a resident of the state and a practitioner in its courts, had all the necessary means of becoming acquainted with its local laws, should form a part of the circuit court in his own state. The judge of the supreme court is expected, with reason, to be well versed in the general laws; but the local laws of the state from the peculiar province of the district

judge, who may be justly considered as particularly responsible for their due observance. If in the case in question, this respondent overlooked or misconstrued any local law of the state of Virginia, which ought to have governed the case, it was equally overlooked and misunderstood, not only by the prisoner's counsel who made the motion, and whose peculiar duty it was to know the law and bring it into the view of the court, but also by the district judge, who had the best opportunities of knowing and understanding it, and in whom, nevertheless, this oversight or mistake is considered as a venal error, while in this respondent it is made the ground of a criminal charge.

This respondent further states, that after the most diligent and the most extensive enquiry which the time allowed for preparing this answer would permit, he can find no law of Virginia which expressly enacts, "in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next succeeding that during which such presentment shall have been made." This principle he supposes to be an inference drawn by the authors of the articles of impeachment, from the law of Virginia mentioned in the answer to the preceding article, the law of November 15th, 1792, which provides "that upon presentment made by the grand jury of an offence not capital, the court shall order the clerk to issue a summons, or other proper process, against the person or persons so presented, to appear and answer such presentment at the NEXT court." This law he conceives does not warrant the inference so drawn from it, because it speaks of *presentments* and not of *indictments*, which are very different things; and is, as he is informed, confined by practice and construction in the state of Virginia, to cases of small offences, which are to be tried by the court itself upon the presentment, without an indictment or the intervention of a petit jury. But for cases, like that of Callender, where an indictment must follow the presentment, this law made no provision. Further, the state laws are directed by the above mentioned act of Congress, to be the rule of decision in the courts of the United States, only "in cases where they apply." Whether they apply or not to a particular case, is a question of law, to be decided by the court where such case is pending, and an error in making the decision is not a crime, nor even an offence, unless it can be shewn to have proceeded from improper motives. This respondent is of opinion, that the law in question did not apply to the case of Callender, for the reasons stated above, and therefore that it would have been his duty to disregard it, even had it been made known to him by the counsel for the traverser.

And in the last place he contends, that the law of Virginia in question, is not adopted by the abovementioned act of congress as the rule of decision, in such cases as that now under consideration. That act does indeed provide, "that the laws of the several states, except where the constitution treaties or statutes of the United States shall otherwise provide, shall be regarded as rules of decision in trials at *common law*, in the courts of the United States, in cases where they apply." But this provision in his opinion, can relate only to rights acquired under the state laws, which come into question *on* the trial; and not to forms of process or modes of proceeding, anterior or preparatory to the trial. Nor can it, as this respondent apprehends, have any application to indictments for offences against the statutes of the United States, which cannot with any propriety be called "trials at common law." It relates merely, in his opinion, to civil rights acquired under the state laws; which by virtue of this provision are, when they come in question in the courts of the United States, to be governed by the laws which they accrued

If in these opinions this respondent be incorrect, it is an honest error: and he contends that neither such an error in the construction of a law, nor his ignorance of a local state law which he had no opportunity of knowing, and of which the counsel for the party whose case it is supposed to have affected were equally ignorant, can be considered as an offence liable to impeachment, or to any sort of punishment or blame.

And for plea to the said sixth article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor as in and by the said article is alledged against him; and this he prays may be enquired of by this honorable court in such manner as law and justice shall seem to them to require.

The seventh article of impeachment relates to some conduct of this respondent in his judicial capacity, at a circuit court of the United States held at New-Castle in the state of Delaware in June 1800. The statement of this conduct made in the article is altogether erroneous; but if it were true, this respondent denies, that it contains any matter for which he is liable to impeachment. It alledges that "disregarding the duties of his office, he did descend from the dignity of a judge, and stoop to the level of an informer." This high offence consisted, according to the article, 1st, in refusing to discharge the grand jury although intreated by several of the said jury to do so" 2dly, in "observing to the said grand jury, after the said grand jury had regularly declared through their foreman, that they had found no bill of indictment, and had no presentments to make, that he the said Samuel Chase understood "that a highly seditious temper had manifested itself in the state of Delaware, among a certain class of people, particularly in New Castle county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order, that the name of this printer was——————" 3dly, "in then checking himself as if sensible of the indecorum which he was committing." 4thly, in adding "that it might be assuming too much, to mention the name of this person; but it becomes your duty, gentlemen, to enquire diligently into this matter," or words to that effect." And 5thly, in authoritatively enjoying on the district attorney of the United States, with intention to procure the prosecution of the printer in question, the necessity of procuring a file of the papers to which alluded, and by strict examination of them to find some passage, which might furnish the ground work of a prosecution against the printer."

These charges amount in substance to this; that the respondent refused to discharge a grand jury on their request, which is every day's practice, and which he was bound to do, if he believed that the due administration of justice required their longer attendance: that he directed the attention of the grand jury to an offence against a statute of the United States, which he had been informed was committed in the district; and that he desired the district attorney to aid the grand jury, in their enquiries concerning the existence and nature of this offence. By these three acts, each of which it was his duty to perform, he is alledged "to have degraded his high judicial functions, and tended to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare."

That this honorable court may be able to form correctly its judgment, concerning the transaction mentioned in this article, this respondent submits the following statement of it, which he avers to be true, and expects to prove.

On the 27 day of June, 1800, this respondent, as one of the associate justices of the supreme court of the United States, presided in the circuit court of the U. States, then held at New castle in and for the district of Delaware, and was assisted by Gunning Bedford esq. then district judge of the United States for that district. At the opening of the court on that day, this respondent according to his duty and his uniform practice, delivered a charge to the grand jury in which he gave in charge to them several statutes of the United States, and among others, an act of Congress passed July 1798, entitled "An act in addition to the act for the punishment of certain crimes against the United States," and commonly called the "sedition law." He directed them to enquire concerning any breaches of those statutes, and especially of that commonly called the sedition law, within the district of Delaware.

On the same day before the usual hour of adjournment, the grand jury came into court, and informed the court that they had found no indictment or presentment, and had no business before them, for which reason they wished to be discharged. This respondent replied, that it was earlier than the usual hour of discharging a grand jury; and that business might occur during the sitting of the court. He also asked them if they had no information of publications within the district, that came under the sedition law, and added, that he had been informed, that there was a paper called the "Mirror," published at Wilmington, which contained libellous charges against the government and president of the

United States: that he had not seen that paper, but it was their duty to enquire into the subject: and if they had not turned their attention to it, the attorney for the district would be pleased to examine a file of that paper, and if he found any thing that came within the sedition law, would lay it before them."—This is the substance of what the respondent said to the jury on that occasion & he believes nearly his words on the morning of the NEXT DAY, they came into court and declared they had no presentments or indictments to make, on which they were immediately discharged. The whole-time therefore, for which they were detained, was twenty four hours, far less than is generally required of grand juries.

In these proceedings, this respondent acted according to his sense of what the duties of his office required. It certainly was his duty to give in charge to the grand jury, all such statutes of the United States as provided for the punishment of offences, and among others, that called the sedition act; into all offences against which act, while it continued in force, the grand jury were bound by their oaths to enquire. In giving it in charge, together with the other acts of Congress for the punishment of offences, he followed moreover the example of the other judges of the supreme court, in holding their respective circuit courts. He also contends, and did then believe, that it was his duty, when informed of an offence, which the grand jury had overlooked, to direct their attention towards it, and to request for them, and even to require if necessary, the aid of the district attorney in making their enquiries. In thus discharging what he conceives to be his duty, even if he committed an error in so considering it, he denies that he committed or could commit any offence whatever.

With respect to the remarks which he is charged by this article with having made to the grand jury, relative to "a highly seditious temper, which he had understood to have manifested itself in the state of Delaware, among a certain class of people, particularly in Newcastle county, and more especially in the town of Wilmington," and relative to "a most seditious printer, residing in Wilmington, unrestrained by any principle of virtue, and regardless of social order;" this respondent does not recollect or believe, that he made any such observations. But if he made them, it could not be improper in him to tell the jury that he had received such information, if in fact he had received it; which was probably the case, though he cannot recollect it with certainty at this distance of time. That this information, if he did receive it, was correct, so far as it regarded the printer in question, will fully appear from a file of the paper called the "Mirror of the Times," &c. published at Wilmington, Delaware, from February 5th, to March 19th, 1800, inclusive, which he has lately obtained, and is ready to produce to this honorable court when necessary, and some extracts from which are contained in the exhibits severally marked No, 7, which he prays leave to make part of this his answer.

And for plea to the said seventh article of impeachment, the said Samuel Chase saith, that he is not guilty of any high crime or misdemeanor, as in and by the said seventh article is alledged against him, and this he prays may be enquired of by this honorable court, in such manner as law and justice shall seem to them to require.

The eighth article of impeachment charges, that this respondent, "disregarding the duties and dignity of his official character, did, at a circuit court for the district of Maryland, held at Baltimore, in the month of May, 1803, prevert his official right and duty to address the grand jury then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland, against their state government and constitution," and also that this respondent, "under pretence of exercising his judicial right to address the grand jury as aforesaid, did endeavor to excite the odium of the said grand jury, and of the good people of Maryland, against the government of the United States by delivering opinions which were, at that time and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering partizan."

In answer to this charge this respondent admits, that he did as one of the associate justices of the supreme court of the Uni-

ted States, preside in a circuit court held at Baltimore in and for the district of Maryland, in May 1803, and did then deliver a charge to the grand jury, and express in the conclusion of it some opinions as to certain public measures, both of the government of Maryland and that of the United States. But he denies that in thus acting, he disregarded the duties and dignity of his judicial character, perverted his official right and duty to address the grand jury, or had any intention to excite the fears or resentment of any person whatever, against the government and constitution of the United States or of Maryland. He denies that the sentiments which he thus expressed, were "intemperate and inflammatory," either in themselves or in the manner of delivering; that he did endeavor to excite the odium of any person whatever against the government of the United States, or did deliver any opinions which were in any respect indecent, or which had any tendency to prostitute his judicial character, to any low or improper purpose. He denies that he did any thing that was unusual, improper, or unbecoming in a judge, or expressed any opinions, but such as a friend to his country, and a firm supporter of the government both of the state of Maryland and of the United States, might entertain. For the truth of what he here says, he appeals confidently to the charge itself; which was read from a written paper now in his possession ready to be produced.—A true copy of all such parts of this paper as relate to the subject matter of this article of impeachment, is contained in the exhibit marked No. 8, which he prays leave to make part of this his answer. That part of it which relates to the article now under consideration, is in these words:—"You know, gentlemen, that our state and national institutions were framed to secure to every member of the society *equal* liberty and *equal* rights; but the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges, and the *recent* change in our state constitution by the establishing *universal* suffrage, *and* the further alteration that is contemplated in our state judiciary, (if adopted) will in my judgment take away *all security for property and personal liberty*. The independence of the national judiciary is already shaken to its foundation; and the virtue of the people alone can restore it. The independence of the judges of this state will be entirely destroyed, if the bill for the abolishing the two supreme courts, should be ratified by the next general assembly. The change of the state constitution, by allowing universal suffrage, will, in my opinion certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a *mobocracy*, the worst of all possible governments.

"I can only lament that the *main pillar* of our state constitution has been thrown down, by the establishment of *universal suffrage*. By this shock *alone*, the whole building totters to its bate, and will crumble into ruins before many years elapse, unless it be *restored* to its original state.—If the independency of your state judges, which your bill of rights wisely declares "to be essential to the impartial administration of justice, and the great security to the rights and liberties of the people," shall be taken away, by the ratification of the bill passed for that purpose, it will participate the destruction of your whole state constitution, and there will be nothing left in it, worthy the care or support of freemen."

Admitting these opinions to have been incorrect and unfounded, this respondent denies that there was any law which forbid him to express them, in a charge to a grand jury; and he contends that there can be no offence, without the breach of some law. The very essence of despotism consists, in punishing acts which, at the time when they were done, were forbidden by no law. Admitting the expression of political opinions by a judge, in his charge to a jury, to be improper and dangerous; there are many improper and very dangerous acts, which not being forbidden by law cannot be punished.—Hence the necessity of new penal laws; which are from time to time enacted for the prevention of acts not before forbidden but found by experience to be of dangerous tendency. It has been the practice in this country, ever since the beginning of the revolution, which separated us from Great Britain, for the judges to express from the bench, by way of charge to the grand jury, and to enforce to the utmost of their ability, such political opinions as they thought correct and useful. There have been instances in which the legislative bodies of this country, have recommended this practice of the judges; and it was adopted by the judges of the su-

preme court of the United States, as soon as the present judicial system was established. If the legislature of the United States considered this practice as mischievous, dangerous or liable to abuse, they might have forbidden it by law; to the penalties of which, such judges as might afterwards transgress it, would be justly subjected. By not forbidding it, the legislature has given to it an implied sanction; and for that legislature to punish it now by way of impeachment, would be to convert into a crime, by an ex post facto proceeding, an act which when it was done & at all times before, they had themselves virtually declared to be innocent. Such conduct would be utterly subversive of the fundamental principles on which free government rests; and would form a precedent for the most sanguinary and arbitrary persecutions, under the forms of law.

Nor can the incorrectness of the political opinions thus expressed, have any influence in deciding on the guilt or innocence of a judge's conduct in expressing them. For if he should be considered as guilty or innocent, according to the supposed correctness or incorrectness of the opinion, thus expressed by him, it would follow, that error in political opinion however honestly entertained, might be a crime; and that a party in power might, under this pretext, destroy any judge, who might happen in a charge to a grand jury, to say something capable of being construed by them, into a political opinion adverse to their own system.

There might be some pretence for saying, that for a judge to utter seditious sentiments, with intent to excite sedition, would be an impeachable offence: altho' such a doctrine would be liable to the most dangerous abuses; and is hostile to the fundamental principles of our constitution, and to the best established maxims of our criminal jurisprudence. But admitting this doctrine to be correct, it cannot be denied that the seditious intention must be proved clearly, either by the most necessary implication from the words themselves, or by some overt acts of a seditious nature connected with them. In the present case no such acts are alledged, but the proof of a seditious intent must rest on the words themselves. By this rule this respondent is willing to be judged. Let the opinions which he delivered be examined and if the members of this honorable court can lay their hands on their hearts, in the presence of God, and say, that these opinions are not only erroneous but seditious also; and carry with them internal evidence of an intention in this respondent to excite sedition, either against the state or general government, he is content to be found guilty.

In making this examination, let it be borne in mind, that to oppose a depending measure by endeavoring to convince the public that it is improper, and ought not to be adopted; or to promote the repeal of a law already past, by endeavoring to convince the public, that it ought to be repealed and that such men ought to be elected to the legislature as will repeal it, to attempt in fine, the correction of public measures, by arguments tending to shew their improper nature or destructive tendency; never has been or can be considered as sedition in any country, where the principles of law and liberty are respected; but it is the proper and usual exercise of that right of opinion and speech, which constitutes the distinguishing feature of free government. The abuse of this privilege, by writing and publishing as facts, malicious falshoods, with intent to defame, is punishable as libellous, in the courts having jurisdiction of such offences; where the truth or falshood of the facts alledged, and the malice or correctness of the intention, form the criterion of guilt and innocence. But the character of libellous, much less of seditious, has never been applied to the expression of opinions concerning the tendency of public measures, or to arguments urged for the purpose of opposing them, or of effecting their repeal. To apply the doctrine of sedition or of libels to such cases, would instantly distroy all liberty of speech, subvert the main pillars of free government, and convert the tribunals of justice into engines of party vengence. To condemn a public measure, therefore, as pernicious in its tendency; to use arguments for proving it to be so; and to endeavor by these means to prevent its adoption, if still depending, or to procure its repeal in a regular and constitutional way, if it be already adopted, can never be considered as sedition or in any way illegal.

The first opinion expressed to the grand jury on the occasion in question, by this respondent, was, that "the late alteration of the federal judiciary, by the abolition of the office of the sixteen circuit judges;

and the recent change in our state constitution, by establishing universal suffrage; and the further alteration that was then contemplated in our state judiciary, if adopted;" would, in the judgment of this respondent, "take away all security for property and personal liberty." That is, "these three measures, if the last of them, which is still depending, should be adopted, will in my opinion, form a system whose pernicious tendency must be to take away the security for our property and our personal liberty," which we have hitherto derived from the salutary restrictions, laid by the authors of our constitution on the right of suffrage, and from the present constitution of our courts of justice." What is this but an argument to persuade the people of Maryland to reject the alterations in their state judiciary which were then proposed; which this respondent as a citizen of that state, had a right to oppose; and the adoption of which depended on a legislature then to be chosen? If this be sedition, then will it be impossible to express an opinion opposite to the views of the ruling party of the moment, or to oppose any of their measures by argument, without becoming subject to such punishment as they may think proper to inflict.

The next opinion is, that "the independence of the national judiciary was already shaken to its foundation, and that the virtue of the people alone could restore it." In other words, "The act of congress for repealing the late circuit court law, and vacating thereby the offices of the judges, has shaken to its foundation the independence of the national judiciary, and nothing but a change in the representation of congress, which the return of the people to correct sentiments can effect, will be sufficient to produce a repeal of this act, and thereby restore to its former vigor, the part of the federal constitution, which has been thus impaired."

This is the obvious meaning of the expression: and it amounts to nothing more than an argument in favor of that change which this respondent then thought and still thinks to be very desirable; an argument, the force of which as a patriot he might feel, and which as a free man he had a right to advance.

The next opinion is, that "the independence of the judges of the state of Maryland, would be entirely destroyed if the bill for abolishing the two supreme courts should be ratified by the next general assembly." This opinion, however incorrect it may be, seems to have been adopted by the people of Maryland, to whom this argument against the bill in question was addressed; for at the next session of the legislature this bill which went to change entirely the constitutional tenure of judicial office in the state, and to render the subsistence of the judges dependent on the legislature, and their continuance in office on the executive, was abandoned by common concent.

All the other opinions expressed by this respondent, as above mentioned, bear the same character with those already considered. They are arguments addressed to the people of Maryland, for the purpose of dissuading them from the adoption of a measure then depending; and of inducing them, if possible, to restore to its original state, that part of their constitution relating to the right of suffrage, by a repeal of the law, which had been made for its alteration.

Such were the objects of this respondent in delivering those opinions, and he contends that they were fair, proper and legal objects, and that he had a right to pursue them in this way: a right sanctioned by the universal practice of this country, and by the acquiescence of its various legislative authorities. Such he contends is the true and obvious meaning of the opinions which he delivered, and which he believes to be correct. It is not now necessary to enquire into their correctness; but, if incorrect, he denies that they contain any thing seditious, or any evidence of those improper intentions which are imputed to him by this article of impeachment. He denies that in delivering them to the grand jury, he committed any offence, infringed any law, or did any thing unusual, or heretofore considered in this country as improper or unbecoming in a judge. If this article of impeachment can be sustained on these grounds, the liberty of speech on national concerns, and the tenure of the judicial office under the government of the United States, must hereafter depend on the arbitraty will of the House of Representatives and the Senate, to be declared on impeachment, after the acts are done, which it may at any time be thought necessary to treat as high crimes and misdemeanors.

And the said Samuel Chase, for plea to the said eighth article of impeachment, saith that he is not guilty of any high crime and misdemeanor, as in and by the

said eighth article is alledged against him and this he prays may be inquired of by this honorable court, in such manner as law & justice shall seem to them to require.

This respondent has now laid before this Honorable Court, as well as the time allowed him would permit, all the circumstances of this case. With an humble trust in Providence and a consciousness that he hath discharged all his official duties with justice and impartiality, to the best of his knowledge and abilities: and that intentionally he hath committed no crime or misdemeanor, or any violation of the constitution or laws of this country—Confiding in the impartiality, independence and integrity of his judges, and that they will patiently hear and conscientiously determine this case, without being influenced by the spirit of party, by popular prejudice or political motives, he cheerfully submits himself to their decision.

If it shall appear to this honorable court from the evidence produced, that he hath acted in his *judicial* character with wilful injustice or partiality, he doth not wish any favor, but expects that the whole extent of the punishment permitted in the constitution will be inflicted upon him.

If any part of his *official* conduct shall appear to this honorable court, *stricti juries*, to have been illegal or to have proceeded from *ignorance* or *error* in judgment; or if any part of his conduct shall appear, although illegal, to have been irregular or improper, but not to have flowed from a deprity of heart, or any unworthy motives, he feels confident that this court will make allowance for the imperfections and frailties incident to man. He is satisfied that every member of this tribunal will observe the principles of humanity and justice, will presume him innocent until his guilt shall be established by legal and credible witnesses; and will be governed in his decision, by the moral and christian rule, of rendering that justice to this responden which he would wish to receive.

This respondent now stands not merely before an earthly tribunal, but also before that awful Being, whose presence fills all space, and whose allseeing eye more especially surveys the temples of justice and religion. In a little time, his accusers, his judges, and himself must appear at the Bar of Omnipotence, where the secrets of all hearts shall be disclosed, and every human being shall answer for his deeds done in the body, and shall be compelled to give evidence against himself in the pretence of assembled universe. To his omniscient judge, at that awful hour, he now appeals for the rectitude and purity of his conduct as to all the matters of which he is this day accused.

He hath now only to adjure each member of this honorable court, by the living GOD, and in his holy name, to render impartial justice to him, according to the constitution and laws of the United States.

He makes this solomn demand of each member, by all his hopes of happiness in the world to come, which he will have voluntarily renounced by the oath he has taken; if he shall wilfully do this respondent injustice, or disregard the constitution or laws of the United States, which he has solemnly sworn to make the rule and standard of his judgment & decision.

SAMUEL CHASE.

A true copy,
Attest,
Samuel A. Otis, Sec.

REPLICATION.

By the House of Representatives of the United States, to the preceding answer and Pleas of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, to the Articles of Impeachment exhibited against him by the said House of Representatives—and presented in open Court by the managers on Thursday, February 7th, 1805.

THE House of Representatives of the United States have considered the Answer of Samuel Chase, one of the Associate Justices of the Supreme court of the United States, to the Articles of Impeachment against him, by them exhibited, in the name of themselves and of all the people of the United States, and observe,

"That the said Samuel Chase hath endeavoured to cover the high crimes and misdemeanors laid to his charge, by evasive insinuations and misrepresentation of facts; that the said answer does give a gloss and coloring utterly false and untrue, to the various criminal matters contained in the said articles; that the said Samuel Chase did, in fact, commit the numerous acts of oppression, persecution, and injustice of which he stands accused; and the House of Representatives, in full confidence of the truth and justice of their accusation, and of the necessity of bringing the said Samuel Chase to a speedy and exemplary punishment, and not doubting that the Senate will use all becoming diligence to do justice to the proceedings of the House of Representatives and to vindicate the honor of the nation, do aver their charge against the said Samuel Chase to be true, and that the said Samuel Chase is guilty in such manner as he stands impeached: and that the House of Representatives will be ready to prove their charges against him, at such convenient time and place as shall be appointed for that purpose.

Signed by order, and in behalf of the house.

NATH. MACON, *Speaker.*

Attest,

JOHN BECKLEY, *Clerk.*

EXHIBITS

ACCOMPANYING

THE ANSWER AND PLEA

OF

The Hon. *SAMUEL CHASE*.

No. I.

United States,
District of Pennsylvania, ff.

(L. S.)

I David Caldwell, clerk of the circuit court of the United States, in and for the district of Pennsylvania, in the third circuit, do hereby certify, that having carefully examined the minutes of the said court, and other documents in my office, I do find—

1st. That the said court, composed of judges Samuel Chase and Richard Peters, sat at Philadelphia from the eleventh day of April, to the second day of May, A. D. 1800.

2d. That there were one hundred and seven civil causes depending, and for trial, comprehending jury causes, chancery cases and appeals; that there were twelve jury causes tried, three arguments in chancery cases, and one on an appeal heard, that the grand jury was impannelled on the twelfth of April, consisting of the following persons, to wit:

1. Joseph Cowperthwait, foreman,
2. Israel Whelen,
3. William Turnbull,
4. Andrew Tybout,
5. Peter Brown,
6. John Lardner,
7. Daniel Smith,
8. James Craig,
9. Philip Wager,
10. Robert Smith,
11. James Crawford,
12. Joseph Ball,
13. James Read
14. William Montgomery,
15. Jonathan Jones,
16. Peter Wikoff,
17. William Warner.
18. Benjamin Bartholomew,
19. David Denny,
20. William Hall, and
21. Casper Morris;

And they were discharged on the second of May.

3d. That there were nine indictments found for treason at that term—one indictment against three persons for other capital crimes, and twelve indictments against forty five persons for misdemeanors, conspiracy, obstructions of process, rescue, and unlawful combinations.

4th. That the witnesses were not bound over or subpœnaed against Fries in particular, but against the persons to be prosecuted generally, that there were eighty three witnesses in the whole: That in the case of Fries there were nine qualified to give evidence before the grand jury, and nineteen to give evidence before the petit jury; that the indictment on which the

ſaid John Fries had been tried and found guilty at April term, 1799, was quaſhed by the order of William Rawle, the attorney of the United States, for the diſtrict of Pennſylvania; and that another indictment was found againſt the ſaid John Fries, in the following words, to wit:

In the circuit court of the United States of America, in and for the Pennſylvania diſtrict of the middle circuit.

The grand inqueſt of the United States of America, in and for the Pennſylvania diſtrict, upon their reſpective oaths and affirmations, do preſent, that John Fries, late of the county of Bucks, in the ſtate and diſtrict of Pennſylvania, yeoman, owing allegiance to the United States of America, wickedly deviſing, and intending the peace and tranquility of the ſaid United States to diſturb, and to prevent the execution of the laws thereof within the ſame, to wit, a law of the ſaid United States, intituled "An act to provide for the valuation of lands and dwelling houſes, and the enumeration of ſlaves, within the United States," and alſo a law of the ſaid United States, intituled "An act to lay and collect a direct tax within the United States;" on the ſeventh day of March, in the year of our Lord one thouſand ſeven hundred and ninety-nine, in the county of Northampton, in the ſtate and diſtrict aforeſaid, and within the juriſdiction of this court, wickedly and traiterouſly did intend to levy war againſt the ſaid United States, within the ſame, and to fulfil and bring to effect the ſaid traiterous intention of him the ſaid John Fries, he the ſaid John Fries afterwards, that is to ſay, on the ſaid ſeventh day of March, in the ſaid year of our Lord one thouſand ſeven hundred and ninety-nine, in the ſaid ſtate, diſtrict and county aforeſaid, and within the juriſdiction of this court, with a great multitude of perſons, whoſe names are to the ſaid grand inqueſt unknown, to a great number, to wit, to the number of one hundred perſons, and upwards, armed and arrayed in a warlike manner, that is to ſay, with guns, ſwords, and other warlike weapons, as well offenſive and defenſive, being then and there unlawfully and traiterouſly aſſembled, did traiterouſly aſſemble and combine againſt the ſaid United States, and then and there with force and arms, wickedly and traiterouſly, and with the wicked and traitorous intention to oppoſe and prevent, by means of intimidation and violence the execution of the ſaid laws of the ſaid United States, within the ſame, did array and diſpoſe themſelves in a warlike and hoſtile manner againſt the ſaid United States, and then and there, with force and arms, in purſuance of ſuch their traitorous intention, he the ſaid John Fries with the ſaid perſons ſo as aforeſaid, traitorouſly aſſembled, armed and arrayed in manner aforeſaid, wickedly and traitorouſly did levy war againſt the ſaid United States.

And further to fulfil and bring to effect the ſaid traitorous intention of him the ſaid John Fries, and in purſuance and in execution of the ſaid wicked and traitorous combination to oppoſe, reſiſt and prevent, the ſaid laws of the ſaid United States from being carried into execution, in the ſtate and diſtrict aforeſaid, he the ſaid John Fries afterwards to wit, on the ſaid ſeventh day of March, in the ſaid year of our Lord one thouſand ſeven hundred and ninety-nine, in the ſtate, diſtrict, and county aforeſaid, and within the juriſdiction of this court, with the ſaid perſons, whoſe names to the grand inqueſt aforeſaid are unknown, did wickedly and traiterouſly aſſemble againſt the ſaid United States, with the avowed intention by force of arms and intimidation, to prevent the execution of the ſaid laws of the ſaid United States, within the ſame; and in purſuance and execution of ſuch their wicked and traitorous combination and intention, he the ſaid John Fries, then and there, with force and arms, with the ſaid perſons to a great number, to wit, the number of one hundred perſons and upwards, armed and arrayed in a warlike manner, that is to ſay, with guns, ſwords, and other warlike weapons, as well offenſive as defenſive, being then and there unlawfully and traiterouſly aſſembled, did wickedly and traiterouſly reſiſt and oppoſe the marſhal of the ſaid United States, in and for the ſaid Pennſylvania diſtrict, in the execution of the duty of his office of marſhal aforeſaid, and then and there with force and arms, with the ſaid great multitude of perſons, ſo as aforeſaid unlawfully and traiterouſly

aſſembled, and armed and arrayed in manner aforeſaid, he the ſaid John Fries wickedly and traitorouſly did oppoſe and reſiſt, and prevent, the ſaid marſhal of the ſaid United State, from executing the lawful proceſs to him directed and delivered againſt ſundry perſons, inhabitants of the county aforeſaid and diſtrict aforeſaid, and charged upon oath before the judge of the diſtrict court of the ſaid United States, for the ſaid diſtrict, with having entered into a conſpiracy to prevent the execution of the ſaid law of the United States, intituled "An act to lay and collect a direct tax within the United States," which proceſs duly iſſued by the ſaid judge of the ſaid diſtrict court of the diſtrict aforeſaid, the ſaid marſhal of the ſaid United States, then and there had in his poſſeſſion, and was then and there proceeding to execute as by law he was bound to do; and ſo the ſaid grand inqueſt, upon their reſpective oaths and affirmations aforeſaid, do ſay, that the ſaid John Fries in manner aforeſaid as much as in him lay, wickedly and traitorouſly did prevent, by means of force and intimidation, the execution of the ſaid laws of the ſaid United States, in the ſaid ſtate and diſtrict of Pennſylvania.

And further to fulfil and bring to effect the ſaid traitorous intention of him the ſaid John Fries, and in purſuance and in execution of the ſaid wicked and traitorous combination to oppoſe, reſiſt and prevent the execution of the ſaid laws of the ſaid United States, in the ſtate and diſtrict aforeſaid, he the ſaid John Fries afterwards, to wit, on the ſaid ſeventh day of March, in the ſaid year of our Lord one thouſand ſeven hundred and ninety-nine, in the ſtate, diſtrict and county aforeſaid, and within the juriſdiction of this court, with the ſaid perſons whoſe names to the grand inqueſt aforeſaid are unknown, did wickedly and traitorouſly aſſemble againſt the ſaid United States with the avowed intention, by means of force and intimidation, to prevent the execution of the ſaid laws of the ſaid United States, in the ſtate and diſtrict aforeſaid, and in purſuance and in execution of ſuch their wicked and traitorous combination and intention, then and there in the ſtate, diſtrict and county aforeſaid, and within the juriſdiction of this court, with force and arms, with a great multitude of perſons, to wit, the number of one hundred perſons and upwards, armed and arrayed in a warlike manner, that is to ſay, with guns, ſwords, and other warlike weapons, as well offenſive as defenſive, being then and there unlawfully, and traitorouſly aſſembled, he the ſaid John Fries did traitorouſly, with force and arms, and againſt the will of the ſaid marſhal of the ſaid United States, in and for the diſtrict aforeſaid, liberate and take out of his cuſtody ſundry perſons by him before that time arreſted, and in his lawful cuſtody then and there being, by virtue of lawful proceſs againſt them iſſued by the ſaid judge of the diſtrict court of the ſaid United States, for the ſaid Pennſylvania diſtrict, on a charge upon oath of a conſpiracy to prevent the execution of the ſaid law of the ſaid United States, intituled, "An act to lay and collect a direct tax within the United States;" and ſo the grand inqueſt aforeſaid, upon their reſpective oaths and affirmations aforeſaid, do ſay, that the ſaid John Fries, as much as in him lay, did then and there in purſuance and in execution of the ſaid wicked and traitorous combination and intention, wickedly and traitorouſly, by means of force and intimidation, prevent the execution of the ſaid law of the ſaid United States, intituled, "An act to provide for the valuation of lands and dwelling houſes, and the enumeration of ſlaves, within the United States," and the ſaid law of the ſaid United States, intituled, "An act to lay and collect a direct tax within the United States," in the ſtate and diſtrict aforeſaid, contrary to the duty of his ſaid allegiance, againſt the conſtitution, peace and dignity of the ſaid United States, and alſo againſt the form of the act of the Congreſs of the ſaid United States, in ſuch caſe made and provided.

WILLIAM RAWLE,

Attorney of the United States for the Pennſylvania Diſtrict.

5th. That the indictment againſt Fries was found on the nineteenth of April, and he was arraigned on the ſame day, and pleaded not guilty, and at his requeſt the court appointed William Lewis and Alexander James Dallas to be his counſel, that his trial commenced on the twenty-fourth

and continued to the twenty-sixth of that month, that the names of the persons composing the petit jury are,

1. Samuel Wheelen, foreman,
2. John Taggart,
3. Henry Pepper,
4. John Balliot,
5. Isaac de Haven,
6. Charles Deshler,
7. John Edge,
8. Henry Dubois,
9. Cornelius Comegy
10. Ephraim Clark,
11. Thomas Bailey, and
12. Laurence Cauffman.

Witness my hand and the seal of the said court, at Philadelphia, this twenty-first day of January, A. D. 1805, *and in the twenty-ninth year of the Independence of the said United States.*

D. CALDWELL,
Clerk of the Circuit Court.

No. II.

The prisoner, John Fries, stands indicted for *levying war* against the United States.

This *constitutional* definition of *treason* is a question of *law*. Every proposition in any statute (whether more or less distinct —whether easy or difficult to comprehend) is always a question of *law*.—What is the true meaning and true import of the statute, and whether the case stated comes within the statute, is a question of *law* and not of *fact*. The question in an indictment for *levying war* against (or adhering to the enemies of) the United States, is "whether the *facts* stated do not amount to *levying war*."

It is the duty of the court in this, and in all *criminal* cases, to state to the jury, their opinion of the *law* arising on the facts; but the jury are to decide on the present, and in all criminal cases, *both the law and the facts* on their consideration of the *whole* case.

The court heard the indictment read on the arraignment of the prisoner, some days past, and just now on his trial, and they attended to the *overt acts* stated in the indictment.

It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect, by *force* or *violence* any object of a great public nature, or of public and general (or national) concern, is a *levying war* against the United States, within the contemplation and construction of the *constitution* of the United States.

On this *general position*, the court are of opinion, that any *such* insurrection or rising to resist or to prevent by *force* or *violence*, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts or excises; or for any *other purpose* (under any pretence, as that the statute was unequal, burthensome, oppressive, or unconstitutional) is a *levying war* against the United States, within the *constitution*.

The reason for this opinion is, that an insurrection to resist or prevent by *force* the execution of any statute, has a *direct* tendency to dissolve all the bonds of society, to destroy all order, and all laws, and also all security for the lives, liberties, and property of the citizens of the United States.

The court are of opinion that military weapons (as guns and swords, mentioned in the indictment) are not necessary to make such *insurrection* or *rising* amount to *levying war*, because numbers may supply the want of *military weapons*; and other instruments may effect the intended mischief. The *legal guilt* of levying war may be incurred without the use of military weapons or military array.

The court are of opinion that the assembling bodies of men, armed and arrayed in a warlike manner, for purposes only of a *private* nature is not *treason*, although the judges and peace officers should be insulted or resisted; or even great *outrage* committed to the persons and property of our citizens.

The true criterion to determine whether *acts committed* are a *treason* or a *less offence*

(as a riot) is the *quo animo* the people did assemble. When the intention is *universal or general*, as to effect some object of a general public nature, it will be treason, and cannot be considered, construed, or reduced to a *riot*. The commission of any number of *felonies*, *riots* or other misdemeanors, cannot alter *their nature*, so as to make them amount to *treason;* and on the other hand, if the *intention and acts combined amount to treason*, they cannot be sunk down to a felony or riot. The intention with which any acts (as felonies, the destruction of houses, or the like) are done, will shew to what class of crimes the case belongs.

The court are of opinion that if a body of people conspire and meditate an insurrection, *to resist or oppose the execution of any statute of the United States* by force, that they are only guilty of a *high misdemeanor;* but if they proceed to carry *such intention into execution by force*, that they are guilty of *the treason of levying war*, and the quantum of the force employed, neither lessens nor increases the crime—whether by one hundred or one thousand persons is wholly immaterial.

The court are of opinion, that a combination or conspiracy to *levy* war against the United States is *not treason*, unless combined with an attempt to carry such combination or conspiracy into execution; some *actual force* or *violence* must be used in pursuance of *such design to levy war*, but that it is altogether immaterial whether the force used is sufficient to effectuate the object; *any force, connected with the intention, will constitute the crime of levying war.*

No. III.

Gentlemen of the Jury!

John Fries, the prisoner at the bar, stands indicted for the crime of *treason*, of levying war against the United States, contrary to the constitution.

By the constitution of the United States, art. 3, sec. 3, it is declared, "That treason against the United States shall consist *only* in *levying war* against them, or in adhering to their *enemies*, giving them aid and comfort."

By the same section it is further declared, "That no person shall be *convicted* of treason, unless on the testimony of two witnesses to the *same overt act*, or on confession in open court;" and that "the Congress shall have power to *declare* the punishment of treason."

Too much praise cannot be given to this *constitutional definition* of treason, and the requiring such full proof for conviction; and declaring that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

This *constitutional* definition of treason is a question of law. Every proposition in any statute (whether more or less distinct—whether easy or difficult to comprehend) is always a question of law. What is the true meaning or true import of any statute, and whether the case stated comes within it, is a question of *law* and not of fact. The question in an indictment for *levying war* against (or adhering to the enemies of) the United States, is "whether the facts stated do or do not amount to *levying war*," within the contemplation and construction of the constitution?

It is the duty of the court in this case, and in all *criminal* cases, to state to the jury, their opinion of the law arising on the *facts;* but the jury are to decide on the present and in all *criminal* cases, *both the law and the facts*, on their consideration of the whole case.

It is the opinion of the court that any insurrection or rising of any body of people, within the United States, to attain or effect, by force or violence any object of a *great public nature* or of *public and general (or national) concern*, is a levying of war against the United States, within the contemplation and construction of the *constitution.*

On this general position the court are of opinion, that any such insurrection, or rising to resist, or to prevent by *force or violence*, the execution of *any* statute of the United States, for levying or collecting taxes, duties, imposts or excises; or for calling forth the militia to execute the laws of the Union, or for any other object

of a general nature or national concern, under any pretence, as that the ſtatute was unjuſt, burthenſome, oppreſſive or unconſtitutional, is a levying war againſt the United States, within the contemplation and conſtruction of the *conſtitution*.

The reaſon for this opinion is, that an inſurrection to reſiſt or prevent by *force* the execution of *any ſtatute* of the United States, has a *direct tendency* to diſſolve all the bonds of ſociety; to deſtroy all order and all laws; and alſo all ſecurity for the lives, liberties and property of the citizens of the United States.

The court are of opinion that military weapons (as guns and ſwords mentioned in the indictment) are not neceſſary to make ſuch *inſurrection* or *riſing* amount to *levying war*; becauſe numbers may ſupply the want of military weapons; and other *inſtruments* may effect the intended miſchief. The legal *guilt of levying war* may be incurred without the uſe of military weapons, or military array.

The court are of opinion that the aſſembling bodies of men, armed and arrayed in a warlike manner for purpoſes only of a *private* nature, is not *treaſon*; although the judges or other peace officers ſhould be inſulted or reſiſted, or even great outrages committed to the perſons or property of our citizens.

The true criterion to determine whether *acts committed are treaſon*, or a leſs offence, as a riot) is the *quo animo* or the *intention* with which the people did aſſemble.—When the *intention* is *univerſal* or *general*, as to effect ſome object of a *general public nature*, it will be *treaſon*, and cannot be conſidered, conſtrued, or *reduced to a riot*. The commiſſion of any number of *felonies*, *riots*, or other miſdemeanors, cannot alter their nature ſo as to make them *amount to treaſon*—and on the other hand if the *intention and acts combined amount to treaſon*, they cannot be ſunk down to a *felony or riot*. The *intention* with which any acts (as felonies, the deſtruction of property or the like) are done, will ſhew to what *claſs of crimes* the caſe belongs.

The court are of opinion that if a body of people conſpire and meditate an inſurrection to *reſiſt or oppoſe the execution of any ſtatute of the United States by force*, that they are *only guilty of a high miſdemeanor*, but if they proceed to carry *ſuch intention into execution by force*—that they are guilty of the *treaſon of levying war*—and the quantum of the force employed neither leſſens, nor *increaſes* the crime, whether by one hundred, or one thouſand perſons, is wholly immaterial.

The court are of opinion that a *combination or conſpiracy to levy war* againſt the United States, is *not treaſon*, unleſs combined with an attempt to carry ſuch combination or conſpiracy into execution;—ſome *actual force* or violence muſt be uſed in purſuance of *ſuch deſign to levy war*—but that is altogether immaterial whether the force uſed is ſufficient to effectuate the object; *any force*, *connected with the intention*, will conſtitute the crime of levying war.

This opinion of the court is founded on the ſame principles, and is, in ſubſtance, the ſame as the opinion of the circuit court, for this diſtrict, in the trials (in April 1795) of Vigol and Mitchell, who were both found guilty by the jury, and afterwards pardoned by the late Preſident.

At the circuit court for the diſtrict (April term, 1799) on the trial of the priſoner at the bar, judge Iredell, *delivered* the *ſame* opinion; and Fries was convicted by the jury.

To ſupport the preſent indictment againſt the priſoner at the bar, two facts muſt be proved to your ſatisfaction.—Firſt, That ſome time before the finding of the indictment, there was an inſurrection (or riſing) of a body of people in the county of Northampton, in this ſtate, with intent to oppoſe and prevent, by means of *intimidation* and *violence*, the execution of a law of the United States, entitled "an act to provide for the valuation of lands and dwelling houſes—the enumeration of ſlaves within the United States;" or of another law of the United States, entitled "an act to lay and collect a direct tax within the United States," and that ſome acts of violence were committed by ſome of the people ſo aſſembled, with intent to oppoſe and prevent, by

means of intimidation and violence, the execution of both, or of one of the said laws of Congrefs.

In the conſideration of this fact, you are to conſider and determine with what intent the people aſſembled at Bethlehem, whether to effect by force a public or a private meaſure.

The intent with which the people aſſembled at Bethlehem in Northampton, is a neceſſary ingredient to the fact of aſſembling, and to be proved like any other fact, by the declarations of thoſe who aſſembled, or by acts done by them, when the queſtion is "what is a man's intent?" It may be proved by a number of connected circumſtances, or by a ſingle fact.

If from a careful examination of the evidence, you ſhall be convinced that the *real* object and intent of the people aſſembled at Bethlehem, was of a public nature) which it certainly was, if they aſſembled with intent to prevent the execution of both of the above mentioned laws of Congrefs, or either of them) it muſt then be proved to your ſatisfaction that the priſoner at the bar incited, encouraged, promoted or aſſiſted in the inſurrection or riſing of the people at Bethlehem, and the terror they carried with them, with intent to oppoſe and prevent, by means of intimidation and violence, the execution of both the above mentioned laws of Congrefs, or either of them; and that *ſome force* was uſed by *ſome* of the people aſſembled at Bethlehem.

In the conſideration of this fact, the court think proper to aſſiſt your enquiry by giving you their opinion.

In treaſon all the *participes criminis* are principals; there are no acceſſaries to this crime. Every act, which in the caſe of felony would render a man an *acceſſary*, will in the caſe of treaſon make him a principal. To render any perſon an accomplice and principal in felony he muſt be aiding and abetting *at the fact*, or ready to afford aſſiſtance if *neceſſary*. If a perſon be preſent at a felony aiding and aſſiſting, he is a *principal*. It is always material to conſider, whether the perſons charged are of the ſame party, upon the ſame purſuit, and under the expectation of mutual defence and ſupport. All perſons *preſent*, aiding, aſſiſting, or abetting any treaſonable act are *principals*. All perſons, who are preſent and countenancing, and are ready to afford aſſiſtance if neceſſary to thoſe who actually commit any treaſonable act, are alſo principals. If a number of perſons aſſemble and ſet out upon a common deſign, as to reſiſt and prevent by force the execution of any law, and ſome of them commit acts of violence and force, with intent to oppoſe the execution of any law, and others are preſent to aid and aſſiſt, if neceſſary, they are all principals. If any man joins and acts with an aſſembly of people, his intent is always to be conſidered and adjudged to be the ſame as their's; and the law in this caſe judgeth of the intent by the fact. If a number of perſons combine or conſpire, to effect a certain purpoſe, as to oppoſe by force the execution of a law, any act of violence done by any one of them, in purſuance of ſuch combination, and with intent to effect ſuch object, is in conſideration of law the act of all who are preſent, when ſuch act of violence is committed. If perſons collect together to act for one and the ſame common end, any act done by any one of them, with intent to effectuate ſuch common end, is a fact that may be given in evidence, againſt *all* of them; the act of each is evidence againſt all concerned.

I ſhall not detain you at this late hour to recapitulate the facts—you have taken notes, and they have been ſtated with accuracy and great candor by Mr. Attorney.

I will only remark, that all the evidence relative to tranſactions before the aſſembling of the armed force at Bethlehem, are only to ſatisfy you of the intent with which the body of the people aſſembled there. If either of three overt acts (or open deeds) ſtated in the indictment, are proved to your ſatisfaction, the court are of opinion that it is ſufficient to maintain the indictment, for the court are of opinion that every overt act is treaſonable.

As to accomplices, they are legal witneſſes, and entitled to credit unleſs deſtroyed by teſtimony in court.

If, upon conſideration of the whole matter, *(law* as well as *fact)* you are *not* fully ſatisfied without any doubt, that the priſoner is guilty of the treaſon charged in the indictment, you will find him not guilty; but if upon the conſideration of the whole matter, *(law* as well as *fact)* you are convinced that the priſoner is guilty of the treaſon charged in the indictment, you will find him guilty.

No. IV.

Circuit court of the United States for the middle district, Virginia District, May term, in the year one thouſand eight hundred.

The United States of America *verſus* James Thompſon Callender. } *Indictment.*

The grand inqueſt of the United States of America, in and for Virginia diſtrict, upon their reſpective oaths do preſent, that James Thompſon Callender, late of the diſtrict of Virginia, printer, being a perſon of wicked, depraved, evil diſpoſed, diſquiet and turbulent mind and diſpoſition, and falſely and maliciouſly deſigning and intending to defame the Preſident of the United States, and to bring him into contempt and diſrepute, and to excite the hatred of the good people of the United States againſt him; on the firſt day of February, in the year of our Lord one thouſand eight hundred, and of the independence of the United States of America the twenty-fourth, in the Virginia diſtrict aforeſaid, and within the juriſdiction of this honorable court; did wickedly and maliciouſly write, print, utter and publiſh, a falſe, ſcandalous, and malicious writing, againſt the ſaid Preſident of the United States, of the tenor and effect following, that is to ſay, "the reign of Mr. Adams (meaning John Adams, Eſq. Preſident of the United States) has been one continued tempeſt of malignant paſſions. As Preſident, he (meaning the ſaid Preſident of the United States) has *never* opened his (meaning the ſaid Preſident of the United States) lips, or lifted his (the ſaid Preſident meaning) pe without threatening and ſcolding; the grand object of his (meaning the ſaid Preſident of the United States) adminiſtration, has been to exaſperate the rage of contending parties, to calumniate and deſtroy every man who differs from his opinions. Mr. Adams (meaning the Preſident of the United States) has labored, and with melancholy ſucceſs, to break up the bonds of ſocial affection, and under the ruins of confidence and friendſhip, to extinguiſh the only gleam of happineſs that glimmers through the dark and deſpicable farce of life."

And alſo, the following falſe, ſcandalous, and malicious words, that is to ſay; "the contriver of this piece had been ſuddenly converted, as he ſaid, to the preſidential (meaning the ſaid Preſident of the United States) ſyſtem, that is to a French war, an American navy, a large ſtanding army, an additional load of taxes, and all the other ſymptoms and conſequences of debt and deſpotiſm:" and alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay; "The ſame ſyſtem of perſecution has been extended all over the continent; every perſon holding an office muſt either quit it, or think and vote exactly with Mr. Adams," (meaning the ſaid Preſident of the United States)—and alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay,—"Adams (the ſaid Preſident meaning) and Waſhington, have ſince been ſhaping a ſeries of theſe paper jobbers into judges and ambaſſadors, as their whole courage lies in want of ſhame; theſe poltroons, without riſking a manly and intelligible defence of their own meaſures, raiſe an affected yelp againſt the corruption of the French Directory, as if any corruption would be more venal, more notorious, more execrated, than their (meaning the ſaid Preſident, and the late general Waſhington) own;" and alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "the object with Mr. Adams, (meaning the ſaid Preſident of the United States) was to recommend a French war, profeſſedly for the ſake of ſupporting American (meaning of the United States) commerce, but in reality for the ſake of yoking us, meaning (the United States of America) into an alliance with the Britiſh tyrant." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect fol-

lowing, that is to say, "while such numbers of the effective agents of the revolution languish in obscurity, or shiver in want, ask Mr. Adams (meaning the said President of the United States) whether it was proper to heap so many myriads of dollars upon William Smith, upon a paper jobber, who, next to Hamilton and himself, (meaning the said President of the United States) is perhaps the most detested character on the continent, (meaning the United States of America.) And also the false, scandalous and malicious words, of the tenor and effect following, "you (meaning the people of the United States) will then make your choice between innocence and guilt, between freedom and slavery, between paradise and perdition; you will chuse between the man who has deserted and reversed all his principles, (meaning the said President) and that man whose own example strengthens all his laws, that man, whose predictions, like those of Henry, have been converted into history. You will choose between that man whose life is unspotted by a crime, and that man (meaning the said President of the United States) whose hands are reeking with the blood of the poor friendless Connecticut sailor: I see the tear of indignation starting on your cheeks! you, (meaning the people of the United States) anticipate the name of John Adams" (meaning the said President of the United States.) And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "Every feature in the conduct of Mr. Adams, (meaning the said President of the United States) forms a distinct and additional evidence, that he was determined at all events to embroil this country with France." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "Mr. Adams, (meaning the said President of the United States) has only completed the scene of ignominy which Mr. Washington began." And also the false, scandalous, and malicious words of the tenor and effect following, that is to say, "This last presidential (meaning the said President of the United States) felony will be buried by Congress in the said Criminal silence as its predecessors." And also, the words of the false, scandalous, and malicious tenor and effect following, that is to say, "Foremost in whatever is detestable, Mr. Adams, (meaning the said President of the United States) feels anxiety to curb the frontier population." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "He (meaning the said President of the United States) was a professed aristocrat; he (meaning the said President of the United States) had proved faithful and serviceable to the British interest, (inuendo against the interest and welfare of the United States.) And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "Thus we see the genuine character of the President, (meaning the said President of the United States) when but in a secondary station, he (meaning the said President of the United States) censured the funding system, when at the head of affairs, he (meaning the said President of the United States) reverses all his former principles. He (meaning the said President of the United States) exerts himself (meaning the said President of the United States) to plunge his (meaning the said President's) country (meaning the United States of America) into the most expensive and ruinous establishments. In the two first years of his (meaning the said President of the United States) presidency, he (meaning the said President of the United States) has contrived pretences to double the annual expence of government, by useless fleets, armies, sinecures, and jobs of every possible description." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "By sending these ambassadors to Paris, Mr. Adams (meaning the said President of the United States) and his (meaning the said President) British faction, designed to do nothing but mischief." And also the false, scandalous, and malicious words, of the tenor and effect following, that is to say, "In that paper, with all the cowardly insolence arising from his (meaning the said President) assurance of personal safety, with all the fury, but without the propriety or sublimity of Homer's Achilles, this hoary headed incendiary (meaning the President of the United States) this libeller (meaning the said President) of the governor of Virginia, bawls out to arms! then to arms! It was floating upon the same bladder of popularity that Mr. Adams (meaning the said

Preſident of the United States) threatened to make this city the centrical point of a bonfire." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "Reader, doſt thou envy that unfortunate old man (meaning the ſaid Preſident of the United States) with his (meaning the ſaid Preſident) twenty-five thouſand dollars a year, with the petty parade of his (meaning the ſaid Preſident) birth day, with the importance of his (meaning the ſaid Preſident) name ſticking in every other page of the ſtatute book. Alas! he (meaning the ſaid Preſident of the United States) is not an object of envy, but of compaſſion and of horror. With Connecticut more than half undeceived, with Pennſylvania diſguſted, with Virginia alarmed, with Kentucky holding him (meaning the ſaid Preſident) in defiance, having renounced all his original principles, [meaning the ſaid Preſident of the United States] and affronted all his [meaning the ſaid Preſident] honeſt friends, he [meaning the ſaid Preſident of the United States] cannot enjoy the ſweet ſlumbers of innocence, he, [meaning the ſaid Preſident of the United States] cannot hope to feel the moſt exquiſitely delightful ſenſation that ever warmed a human breaſt, the conſciouſneſs of being univerſally and deſervedly beloved."————And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "It is happy for Mr. Adams himſelf [meaning the ſaid Preſident] as well as for his [meaning the ſaid Preſident] country, that he [meaning the ſaid Preſident of the United States] aſſerted an untruth." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "In the midſt of ſuch a ſcene of profligacy, and of uſury the Preſident [meaning the ſaid Preſident of the United States] has perſiſted as long as he durſt, [meaning the ſaid Preſident] in making his [meaning the ſaid Preſident] utmoſt efforts for provoking a French war." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "For although Mr. Adams, [meaning the ſaid Preſident of the United States] were to make a treaty with France, yet ſuch is the groſsneſs of his [meaning the ſaid Preſident] prejudice, and ſo great is the violence of his [meaning the ſaid Preſident] paſſions, that under his [meaning the ſaid Preſident's adminiſtration, America, [meaning the United States of America] would be in conſtant danger of a ſecond quarrel." And alſo the falſe, ſcandalous, and malicious words of the tenor and effect following, that is to ſay,—— "When a chief magiſtrate [meaning he ſaid Preſident of the United States] is, both in his [meaning the ſaid Preſident] ſpeeches, and [meaning the ſaid Preſident] newſpapers, conſtantly reviling France, he [meaning the ſaid Preſident] can neither expect or deſire to live long in peace with her. Take your choice then between Adams, [meaning the ſaid Preſident] war and beggary, and Jefferſon, peace and competency." To the great ſcandal of the Preſident of the United States, to the evil and pernicious examples of all others, in the like caſe offending, againſt the form of the act of Congreſs of the United States, in ſuch caſe made and provided, and againſt the peace and dignity of the ſaid United States of America.

And the grand inqueſt aforeſaid, upon their reſpective oaths do further preſent, that the ſaid James Thompſon Callender, on the ſaid 1ſt day of February, in the ſame year of our Lord 1800, and of the independence of America the twenty-fourth, deſigning and intending to defame the Preſident of the United States, and to bring him into contempt and diſrepute, and to excite the hatred of the good people againſt him, in the diſtrict aforeſaid, and within the juriſdiction of this court, wickedly and maliciouſly did cauſe, or procure to be printed and publiſhed, a falſe, ſcandalous, and malicious writing, againſt the ſaid Preſident of the United States, of the tenor and effect following, that is to ſay, "the reign of Mr. Adams (meaning John Adams, eſquire, Preſident of the United States) has hitherto been one continual tempeſt of malignant paſſions, as Preſident, he (meaning the ſaid Preſident of the United States) never opened his (meaning the ſaid Preſident of the United States) lips, or lifted his (the ſaid Preſident meaning) pen, without threatening and ſcolding; the grand object of his (meaning the ſaid Preſident of the United States) adminiſtration, has been to exaſperate the rage of contending parties, to ca-

humiliate and deſtroy every man who differs from his opinions. Mr. Adams (meaning the ſaid Preſident of the United States) has labored, and with melancholy ſucceſs, to break up the bonds of ſocial affection, and under the ruins of confidence, of friendſhip, to extinguiſh the only beam of happineſs that glimmers through the dark and deſpicable farce of life." And alſo the following falſe, ſcandalous and malicious words, tha is to ſay: "The contriver of this piece had been ſuddenly converted, as he ſaid, to the preſidential (meaning the ſaid Preſident of the United States) ſyſtem, that is, to a French war, an American navy, a large ſtanding army, an additional load of taxes, and all the other ſymptoms and conſequences of debt and deſpotiſm." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay: "The ſame ſyſtem of perſecution has been extended all over the continent, every perſon holding an office, muſt either quit it, or think and vote exactly with Mr. Adams," (meaning the ſaid Preſident of the United States.) And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay:— "Mr. Adams (the ſaid Preſident meaning) and Waſhington, have ſince been ſhaping a ſeries of theſe paper jobbers into judges and ambaſſadors; as their whole courage lies in want of ſhame, theſe poltroons, without riſking a manly and intelligible defence of their own meaſure, raiſed an affected yelp againſt the corruption of the French directory, as if any corruption could be more venal, more notorious, more execrated than their (meaning the ſaid Preſident and the late general Waſhington) own." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay:— "The object with which Mr. Adams (meaning the ſaid Preſident of the United States) was to recommend a French war, profeſſedly for the ſake of ſupporting American (meaning of the United States) commerce, but in reality for the ſake of yoking us (meaning the United States of America) into an alliance with the Britiſh tyrant." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay: "While ſuch numbers of the effective agents of the revolution languiſh in obſcurity or ſhiver in want, aſk Mr. Adams (meaning the ſaid Preſident of the United States) whether it was proper to heap ſo many myriads of dollars upon William Smith, upon a paper jobber, who next to Hamilton and himſelf (meaning the ſaid Preſident of the United States) is perhaps the moſt deteſted character on the continent" (meaning the United States of America.) And alſo the falſe, ſcandalous and malicious words of the tenor and effect following: "You (meaning the people of the United States) will then take your choice between innocence and guilt; between freedom and ſlavery—between paradiſe and perdition. You will then chuſe between the man who has deſerted and reverſed all his principles (meaning the ſaid Preſident) and that man whoſe own examples ſtrengthen all his laws—that man, whoſe predictions, like thoſe of Henry, have been converted into hiſtory. You will chuſe between that man whoſe life is unſpotted by a crime, and that man (meaning the ſaid Preſident of the United States) whoſe hands are reeking with the blood of the poor friendleſs Connecticut ſailor. I ſee the tear of indignation ſtanding on your cheeks! You (meaning the people of the United States) anticipate the name of John Adams (meaning the ſaid Preſident of the United States.") And alſo the falſe, ſcandalous and malicious words of the tenor and effect following, that is to ſay, "every feature of the conduct of Mr. Adams (meaning the ſaid Preſident of the United States) forms a diſtinct and additional evidence, that he was determined at all events, to embroil this country with France:" And alſo the falſe and ſcandalous words of the tenor and effect following, that is to ſay, "Mr. Adams (meaning the ſaid Preſident of the United States) has only completed the ſcene of ignominy which Mr. Waſhington began." And alſo the falſe, ſcandalous and malicious words of the tenor and effect following, that is to ſay, "This laſt preſidential (meaning the ſaid Preſident of the United States) felony will be buried by Congreſs in the ſame criminal ſilence as its predeceſſors." And alſo, the words of the falſe, ſcandalous, and malicious tenor and effect following, that is to ſay, "Foremoſt in whatever is deteſtable, Mr. Adams, (meaning the ſaid Preſident of the United States) feels anxiety to curb the frontier population,"—

And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "He (meaning the ſaid Preſident of the United States) was a profeſſed ariſtocrat; he (meaning the ſaid Preſident of the United States) had proved faithful and ſerviceable to the Britiſh intereſt, (inuendo) againſt the intereſt and welfare of the United States of America." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "Thus we ſee the genuine character of the Preſident, (meaning the ſaid Preſident of the United States) when in but a ſecondary ſtation, he (meaning the ſaid Preſident of the United States) cenſured the funding ſyſtem, when at the head of affairs, he [meaning the ſaid Preſident of the United States] reverſes all his former principles. He [meaning the ſaid Preſident of the United States] exerts himſelf [meaning the ſaid Preſident of the United States] to plunge his [meaning the ſaid Preſident's] country [meaning the United States of America,] into the moſt expenſive and ruinous eſtabliſhments. In the two firſt years of his [meaning the ſaid Preſident of the United States,] preſidency, he [meaning the ſaid Preſident of the United States] has contrived pretences to double the annual expences of government, by uſeleſs fleets, armies, ſinecures, and jobs of every poſſible deſcription.

And alſo the falſe, ſcandalous and malicious words of the tenor and effect following, that is to ſay, "By ſending theſe ambaſſadors to Paris, Mr. Adams [meaning the ſaid Preſident of the United States] and his [meaning the ſaid Preſident] Britiſh faction, deſigned to do nothing but miſchief:" And alſo the falſe, ſcandalous, and malicious words of the tenor and effect following, that is to ſay, "In that paper, with all the cowardly inſolence ariſing from his [meaning the ſaid Preſident] aſſurance of perſonal ſafety, with all the fury, but without the propriety or ſublimity of Homer's Achilles, this hoary headed incendiary [meaning the ſaid Preſident of the United States] this libeller [meaning the ſaid Preſident] of the governor of Virginia, calls out to arms! then to arms! It was floating upon the ſame bladder of popularity that Mr. Adams [meaning the ſaid Preſident of the United States) threatened to make this city, the centrical point of a bonfire:" And alſo the falſe, ſcandalous and malicious words of the tenor and effect following, that is to ſay, "Reader, deſt thou envy that unfortunate old man (meaning the ſaid Preſident of the United States) with his [meaning the ſaid Preſident] twenty-five thouſand dollars a year, with the petty parade of his [meaning the ſaid Preſident] birth day, with the importance of his [meaning the ſaid Preſident] name ſticking in every other page of the ſtatute book. Alas! He [meaning the ſaid Preſident of the United States] is not an object of envy, but of compaſſion and of horror. With Connecticut more than half undeceived, with Pennſylvania diſguſted, with Virginia alarmed, with Kentucky holding him [meaning the ſaid Preſident] in defiance, having renounced all his original principles [meaning the ſaid Preſident of the United States] and affronted all his [meaning the ſaid Preſident] honeſt friends, he [meaning the ſaid Preſident of the United States] cannot enjoy the ſweet ſlumbers of innocence, he [meaning the ſaid Preſident of the United States] cannot hope to feel the moſt exquiſitely delightful ſenſation that ever warmed a human breaſt, the conſciouſneſs of being univerſally and deſervedly beloved." And alſo the falſe, ſcandalous, and malicious words, of the tenor and effect following, that is to ſay, "it is happy for Mr. Adams himſelf, (meaning the ſaid Preſident) as well as for his [meaning the ſaid Preſident] country, that he (meaning the ſaid Preſident of the United States) aſſerted an untruth." And alſo the falſe, ſcandalous and malicious words, of tenor and effect following, that is to ſay; "In the midſt of ſuch a ſcene of proſligacy, and of uſury, the Preſident (meaning the ſaid Preſident of the United States) has perſiſted as long as he durſt (meaning the ſaid Preſident) in making his (meaning the ſaid Preſident) utmoſt efforts for provoking a French war." And alſo the falſe, ſcandalous, and malicious words, of tenor and effect following, that is to ſay; "For although Mr. Adams (meaning the ſaid Preſident of the United States) were to make a treaty with France, yet ſuch is the groſsneſs of his (*meaning* the ſaid Preſident) prejudice, and ſo great is the violence of his (mean-

ing the said President) passions, that under his meaning the said President administration, America (meaning the United States of America) would be in constant danger of a second quarrel." Also the false, scandalous, and malicious words, of the tenor and effect following, that is to say; "When a chief magistrate (meaning the said President of the United States) is both in his (meaning the said President) speeches and his (meaning the said President) newspapers constantly reviling France, he (meaning the said President) can neither expect or desire to live long in peace with her. Take your choice then, between Adams, (meaning the said President) war, and beggary, and Jefferson, peace and competency," to the great scandal of the President of the United States, to the evil and pernicious example of all others in the like case offending, against the form of the act of the Congress of the United States, in such case made and provided, and against the peace and dignity of the said United States of America.

THOMAS NELSON,

Attorney of the United States for Virginia District.

District of Virginia, to wit:

(L. S.)

I do hereby certify the foregoing to be a true copy of the indictment on which James Thompson Callender was sentenced in the court of the United States, for the middle circuit in the Virginia district, to fine and imprisonment for a libel against John Adams, Esq. President of the United States.

In testimony whereof I have hereunto placed the seal of the said court.

WILLIAM MARSHALL, *Clerk.*

Copy of the verdict of the petit jury, impannelled to try the issue joined in the court of the United States, for the middle circuit, in the Virginia district, at the May court, 1804, between the United States of America, and James Thompson Callender, for a seditious libel.

We, of the jury, upon mature deliberation and investigation, find James Thompson Callender guilty of each and every charge contained in the foregoing indictment.

BERNARD MACKHAM, *Foreman.*

A Copy,

Attest, WM. MARSHALL, *Clerk.*

No. V.

City of Richmond, ss.

This day James Thompson Callender made oath before me, a magistrate of the said city, that William Gardner, Tench Coxe, Judge Bee, Timothy Pickering, William B. Giles, Stephen Th[illegible]son Mason, and General Blackburn, [illegible] believes to be material witnesses in his [illegible]nce, against an indictment found against him during the present term of the circuit court of the United States, for the middle circuit, Virginia district; That William Gardner aforesaid resides, he believes, in Portsmouth in the state of New-Hampshire: that Tench Coxe aforesaid resides in Philadelphia, in the state of Pennsylvania: that Judge Bee resides, the deponent hath understood, in South-Carolina, but in what part of the state he knows not —that Timothy Pickering aforesaid resided of late in Philadelphia, in the state of Pennsylvania, but where he resides at this time the deponent doth not know; that William B. Giles, aforesaid, he hath understood since he hath been furnished with a copy of the indictment, and since the said Giles hath left town, resides in the county of Amelia; and that gen. Blackburn resides in the county of Bath. The said James Thompson Callender further declares, that he expects to prove by the said William Gardner, and that he verily believes that he shall prove by the said William Gardner, that the said William Gardner was commissioner of loans for the state of New-Hampshire, under the government of the United States, and that he was turned out of the said office of commissioner of loans, because, he the said Gardner, refused to subscribe an address circulated in the town of Portsmouth, in New-Hampshire, and presented

to the Preſident of the United States, in in the year 1798, at the inſtance of ſeveral inhabitants of the ſaid town, in which addreſs, unequivocal approbation of the conduct of the ſaid Preſident in the adminiſtration of the United States is expreſſed.

2nd. The ſaid James Thompſon Callender alſo declares, on oath, that he verily believes that he ſhall prove by the evidence of Tench Coxe aforeſaid, tha he, the ſaid Tench Coxe, in the year 1798, held an important office under the government of the United States, to wit, commiſſioner of the revenue, from which office the ſaid Coxe was ejected by the preſent Preſident of the United States, becauſe he did not approve the meaſures of his, the ſaid Preſiden 's adminiſt ation, or the principles on which it was conducted. That he v rily believes that he ſhall be able to prove, by the evidence of judge Bee, hat he did receive from the Preſident of the United States in the year 1799, a letter in which he the ſaid Preſident, did adviſe and requeſt the ſaid judge Bee, then acting in his judicial character, to deliver to the conſul of the Britiſh nation, in Charleſton, Jonathan Robbins, alias Thomas Naſh, who had been apprehended and carried before the ſaid Judge, on a charge of murder committed on the high ſeas, on board the Britiſh frigate Hermione.

He farther depoſes on oath, that he verily believes that he ſhall be able to prove by the evidence of Timothy Pickering, that the Preſident of the United States was in poſſeſſion of diſpatches from Mr. Vans Murray, American miniſter in Holland, containing aſſurances on the part of the French Republic that ambaſſadors from the United States would be received in a way ſatisfactory to the people and government of the United States, many weeks while Congreſs was in ſeſſion, before he communicated the ſame to Congreſs.

The deponent further ſaith, that he verily believes that he ſhall be able to prove, by the evidence of Stephen Thompſon Maſon, and William B. Giles, that John Adams, Preſident of the United States has unequivocally avowed in converſation with them, principles utterly incompatible with the principles of the preſent conſtitution of the United States; principles which could not be carried into operation under any political inſtitution, without the eſtabliſhment of a direct, powerful and dangerous ariſtocracy; that he declared in expreſs terms, to the ſaid Stephen Thompſon Maſon that he had no more idea that the preſent federal conſtitution could, for any length of time, controul the people of the United States, than that it could controul the motion of the planets; that he alſo declared to the ſ id Stephen Thompſon Maſon, that he had no more idea that a political ſociety could exiſt without a diſtinction of ranks, than that an army could exiſt without officers; and alſo that he can prove by the ſaid William B. Giles, that the Preſident of the United States has avowed in converſation with him, a ſentiment to this effect, that he thought the executive department of the United States, ought to be veſted with power to direct and controul the public will.

That this deponent verily believes that he ſhall be able to prove by general Blackburn, that he did on the day of in the year 1798, receive an addreſs from John Adams, Preſident of the United States, in anſwer to the field officers of Bath county, in which the ſaid Preſident does avow that there was a party in Virginia which deſerved to be humbled into duſt and aſhes, before the indignant frowns of their injured, inſulted and offended country.

And this deponent further ſaith, he is adviſed and believes, that, it is material to his defence againſt the indictment aforeſaid, that he ſhould procure authentic copes of ſundry anſwers made by the Preſident of the United States, to addreſſes from the inhabitants of the United States in various parts thereof, which authentic copie s he cannot procure, ſo as to be in readineſs for trial during the preſent term.

He alſo ſaith that he is adviſed, and doth believe, that a certain book, entitled, "An Eſsay on Canon and Feudal Law," or entitled in words to that purport, aſcribed to the Preſident of the United States, and of which he believes the

Preſident is the author, is material to his defence, and that he cannot procure a copy of the ſame, and evidence that the ſaid Preſident is the author thereof, without being allowed ſeveral weeks and perhaps months for the purpoſe.

He further ſaith that he is told by the counſel who mean to appear for him, that they cannot poſſibly be prepared to inveſtigate the evidence relating to the ſeveral charges in the indictment, even if all the perſons and documents wanted, were upon the ſpot.

WILLIAM DUVAL.

May 28th, 1800.

A copy,

Atteſt,

WILLIAM MARSHALL, *Clerk.*

No. VI.

Extracts from the pamphlet called "The Proſpect Before Us," to ſhew the calumnies of Preſident Waſhington, by James Thompſon Callender.

Page 10. "I now return to the tremor of 1787, by which the "government of *your own choice*," the federal conſtitution, was crammed down the gullet of America."

Page 15. "They (meaning the Georgia delegates in the convention) did not foreſee the Waſhington plan of defending, or rather of deſerting, the ſouth weſtern frontier."

Page 16. "By his own account, therefore, Mr. Waſhington has been twice a traitor. He firſt renounced the king of England, and thereafter the old confederation."

Page 17. "The following inſtance, out of many, ſhews in what manner Mr. Waſhington tranſacted buſineſs. On a queſtion that was to come before the cabinet, he previouſly aſked the opinion of Mr. Jefferſon, and after hearing it, obſerved, that his own ſentiments had been the ſame. When the council met, Hamilton and Knox voted, as uſual, upon one ſide, and Jefferſon on the other.—"Gentlemen, I leave it to yourſelves," were the words of Mr. Waſhington; and the point was carried by the majority.—The extravagant popularity poſſeſſed by this citizen reflects the utmoſt ridicule on the diſcernment of America. He approved of the funding ſyſtem, the aſſumption, the national bank, and in contradiction to his own ſolemn promiſe*, he authoriſed the robbery and ruin of the remnants of his own army."

Page 18. In the fall of 1796, when the French began their depredations, the country fell into a more dangerous juncture than almoſt any which the old confederation ever endured. The tardineſs and timidity of Mr. Waſhington were ſucceeded by the rancor and inſolence of Adams."

Idem. "Under the old confederation, matters never were, nor could have been conducted ſo wretchedly as they actually are, and have been under the ſucceſſive monarchs of Braintree, and Mount Vernon."

Page 19. "It has been frequantly aſſerted, and never denied," ſays Mr. Findley, "that the power of granting charters of incorporation, was repeatedly moved for in the federal convention, and eſpecially the power of *incorporating BANKS*, but always rejected by a great majority." Mr. Waſhington was preſident of this federal convention. Of courſe he could not plead ignorance of its intention againſt the erection of a national bank. He ſwore to ſupport the conſtitution. Directly after, he ratified the bank law, which drove the plough-ſhare of paper-jobbing through the very midſt of his double oath, as a federal citizen, and as a Preſident."

Page 27. "For all this confuſion and iniquity, we muſt thank Mr. Waſhington. He acted like a tenant, who quits the premiſes without giving notice to the landlord, that he may provide a ſucceſſor."

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* At Newburgh, March 15th, 1783.

Page 34. "Note.

* If Washington wanted to corrupt the American judges, he could not have taken a more decisive step, than by the appointment of Jay."

Page 39. "His refusal must be resolved, therefore, into that utter want of feeling, which constitutes the key-stone of character; and which has cost the lives of so many hundreds of families, on the south western frontier."

Pages 39 and 40. "The wretched proclamation of neutrality, of April 22d, 1793, was most likely communicated to Pitt, long before it had been openly proposed in the cabinet of America. On the 8th of June following, the court of London issued the order for seizing neutral ships, bound to France with provisions.—This was just forty-six days after the proclamation of Mr. Washington. Perhaps his manifesto had reached England before that order issued. At any rate, Pitt was undoubtedly acquainted with the President's abhorrence for the French revolution."

Page 99. "The proclamation of neutrality does not, therefore, deserve that title. It was a proclamation of ignorance and pusillanimity."

Page 41. "Mr. Washington had then only two things to do: The one to negociate with the court of Lisbon, for the continuance of the blockade. The other to redeem the prisoners, whose deliverance he had prevented some years before. On this occasion Mr. Washington displayed the same want of wisdom and economy, that marks almost every other part of his administration."

Pages 47 and 48. "The first wrong step of the President, with regard to the remittance of the tribute, was aggravated by every possible circumstance of impropriety. In direct breach of the constitution, he involved the United States in the additional expense of that frigate, without deigning to consult the legislature of his country. If such proceedings are suffered, it is evident that all civil government must soon be at an end. I am as solicitous as any man can be to think well of Mr. Washington, to believe, if possible, that he was misled by the bad people about him, and that he served his country with zeal, as far as his faculties and information would carry him."

Page 72. "Adams and Washington have since been shaping a series of these paper-jobbers into judges and ambassadors. As their whole courage lies in want of shame, these poltroons, without risking a manly and intelligible defence of their own measures, raise an affected yelp against the corruption of the French directory; as if any corruption could be more venal, more notorious, more execrated than their own. For years together the United States resounded with curses against them, while the grand lama of federal adoration, the immaculate divinity of Mount Vernon approved of, and subscribed every one of their blackest measures."

Page 102. "This speech has a charm, that completely unmasks the scandalous hypocrisy of Washington."

Idem. "Mr. Adams has only completed the scene of ignominy, which Mr. Washington began."

Page 103. "The expences of each army were successively abstracted from the treasury by Mr. Washington, without the sanction of a statute, and in express breach of the constitution. Mr. Washington disdained to make an apology for this violation of his duty; and in both, congress were too mean to demand it. The charges of the recent tour to Northampton must have been obtained in the same way, because Congress were not in session when that affray broke out. This last presidential felony will be buried by Congress in the same criminal silence as its predecessors."

Extracts from a pamphlet called "The Profpect before Us," to fhew the calumnies of Prefident Adams, by James Thompfon Callender, for which he was indicted, tried, and found guilty, and fined 200 dollars, and imprifoned nine months.

1. "The reign of Mr. Adams has hitherto been one continued tempeft of malignant paffions. As prefident he has never opened his lips, nor lifted his pen without threatening or fcolding. The grand object of his adminiftration has been to exafperate the rage of contending parties, to calumniate and deftroy every man who differs from his opinions. Mr. Adams has labored, and with melancholy fuccefs, to break up the bonds of focial affection, and under the ruins of confidence and friendfhip, to extinguifh the only beam of happinefs, that glimmers through the dark and defpicable farce of life."

2. "The contriver of this piece had been fuddenly converted, as he faid, to the prefidential fyftem, that is, to a French war, an American navy, a large ftanding army, an additional load of taxes, and all other fymptoms of debt and defpotifm."

3. "The fame fyftem of perfecution has been extended all over the continent, every perfon holding an office muft either quit it, or think and vote exactly with Mr. Adams."

4. "Adams and Waſhington have fince been fhaping a feries of thefe paper-jobbers into judges and ambaffadors. As their whole courage lies in want of fhame, thefe poltroons, without rifking a manly and intelligible defence of their own meafures, raife an affected yelp againft the corruption of the French Directory, as if any corruption could be more venal, more notorious, more execrated than their own."

5. "The object with Mr. Adams was to recommend a French war, for the fake of fupporting American commerce, but in reality for the fake of yoking us into an alliance with the Britifh tyrant."

6. "While fuch members of the effective agents of the revolution languifh in obfcurity, or fhiver in want, afk Mr. Adams, whether it was proper to heap fo many myriads of dollars upon William Smith, upon a paper-jobber, who next to Hamilton, and himfelf, is perhaps the moft deteftable character on the continent."

7. "You will then take your choice between innocence and guilt, between freedom and flavery, between paradife and perdition. You will chufe between the man, who has deferted and reverfed all his principles, and that man whofe own example ftrengthens all his laws; that man, whofe predictions, like thofe of Henry, have been converted into hiftory. You will chufe between that man, whofe life is unfpotted by a crime, and that man whofe hands are reeking with the blood of the poor friendlefs Connecticut failor. I fee the tear of indignation ftarting on your cheeks. You anticipate the name of John Adams."

8. "Every feature in the conduct of Mr. Adams, forms a diftinct and additional evidence, that he was determined at all events to embroil this country with France."

9. "Mr. Adams has only completed the fcene of ignominy which Mr. Waſhington began."

10. "This laft prefidential felony will be buried by Congrefs, in the fame criminal filence, as its predeceffors."

11. "Foremoft in whatever is deteftable, Mr. Adams feels anxiety to curb the frontier population."

12. "He was a profeffed ariſtocrat—he had proved faithful and ferviceable to the Britifh intereft."

13. "Thus we fee the genuine character of the Prefident, when in but a fecondary ſtation, he cenſured the funding ſyſtem; when at the head of affairs, he reverſes all his former principles—he exerts himſelf to plunge his country into the moſt expenſive and ruinous eſtabliſhments. In the two firſt years of his preſidency, he has contrived pretences to double the annual expenſe of government, by uſeleſs

fleets, armies, sinecures, and jobs of every possible description."

14. "By sending these ambassadors to Paris, Mr. Adams, and his British faction designed to do nothing but mischief."

15. "In that paper, with all the cowardly insolence arising from his assurance of personal safety, with all the fury, but without the propriety or sublimity of Homer's Achilles, this hoary headed incendiary, this libeller of the governor of Virginia, bawls out, to arms! then to arms! It was floating upon the same bladder of popularity, that Mr. Adams threatened to make this city the centrical point of a bonfire."

16. "Reader! dost thou envy that unfortunate old man, with his twenty-five thousand dollars a year, with the petty parade of his birth-day, with the importance of his name sticking in every other page of the statute book. Alas! he is not an object of envy, but of compassion and horror. With Connecticut more than half undeceived, with Pennsylvania disgusted, with Virginia alarmed, with Kentucky holding him in defiance, having renounced all his original principles, and affronted all his honest friends, he cannot enjoy the sweet slumbers of innocence; he cannot hope to feel the most exquisitely delightful sensation that ever warmed a human breast, the consciousness of being universally and deservedly beloved."

17. "It is happy for Mr. Adams himself, as well as for his country, that he asserted an untruth."

18. "In the midst of such a scene of profligacy and of usury, the President has persisted as long as he durst, in making his utmost efforts for provoking a French war."

19. "For although Mr. Adams were to make a treaty with France, yet such is the grossness of his prejudice, and so great is the violence of his passions, that under his administration America would be in constant danger of a second quarrel."

20. "When a chief magistrate is both in his speeches and in his newspapers, constantly reviling France, he can neither expect nor desire to live long in peace with her. Take your choice then between Adams, war and beggary, and Jefferson, peace and competency."

Remarks on these passages by Mr. Nelson, attorney for the district of Virginia, in his speech to the petit jury who tried Callender, may be seen in the deposition of David Robertson, as reported by the committee of enquiry.

No. VII.

Extract from the Mirror of the 5th of February, 1800.

COMMUNICATION.

The *Illuminati* of New England are composed of certain *ecclesiastics*, who wish for political sway; and of *laymen* in office, who wish for *clerical* influence to retain them in place; by the means of the pulpit and sword; or church and state.

The senators and representatives in Congress from Connecticut, belong to the *New-England Illuminati*, and obey the President of Yale, who rules with the united power of a teacher and ecclesiastic. Mr. Hillhouse guides the state treasury so far as to gain unlawful and unconstitutional grants of money for the *Illuminati*.

The wives of Messrs. Dwight, Hillhouse, and Davenport, of Congress, are cousins; Messrs. Goodrich's are brothers —Messrs. Wolcott of the treasury, and Griswold of Congress, are cousins; as are Messrs. Griswold and Hillhouse; Mr. Chauncy Goodrich married the sister of Oliver Wolcott; and Mr. Eleazar Goodrich married the sister of Mr. Allen, late of Congress.

Thus are church and state, and the ties of blood and marriage united, to form a *hierarchy* and *aristocracy* in Connecticut, which some fail not to call a *monarchy* controlled by Dr. Dwight.

A desire for place, favor and power conducts this system. Mr. Tracy and his son-in-law at home, are seeking for money and influence thro' this union,

Mr. Tracy wiſhes to be a foreign emy —Mr. Eleazar Goodrich is lookingor the place of collector of the cuſtomin New-Haven.

Preſident Dwight has a hoſt of brotlrs, ſons, and couſins, who want employmt. His brother Theodore wants to be aiſtrict attorney, and to have a ſeat in Congreſs, or the upper houſe in Connecfut.

Tapping Reeve, one *of the Illumati*, and one of the judges of the ſuperior urt is a promoter of the tyranny aſſum by members of Congreſs from Connecfut, in order to obtain the place of dtrict judge.

The above is the *clue* to the *ſeditin* law —certain gentlemen did not wiſh tthave their conduct and deſigns inveſtigæd at home; for this cauſe they have iſhed to deſtroy the Editor of the *Bee*, ad introduce a ſyſtem of *terror*.

Extract from the Mirror of the 8th f February, 1800.

COMMUNICATION.

In our laſt we preſented a ‘ *clue*’ o the politics of Connecticut, from theirdeſire to obtain place and favor. We now exhibit a *clue* to the New-Hampſhire *triſtocracy*. The collector of the cuſtoms loan officer, marſhal, one of the ſenators of Congreſs, and two of the repreſentatives in that body, were *old and avowedtories*, and have ever continued to be *ſuch*. The contractor for the naval or ſhip bulding department was alſo a *tory*—he is brother to one of the repreſentatives, whoſe ſiſter is married to the diſtrict judge, (whoſe former reſpect for the independence of America is doubtful.)

Theſe three gentlemen are allied to the Preſident of Cambridge college, who married the ſiſter of the wife of the diſtrict judge, and of the naval contractor and one of the repreſentatives.

The former *tory* ſenator is Mr. Livermore. The repreſentatives are Meſſrs. Sheaff and Gordon; the diſtrict judge is a Mr. Pickering; the naval contractor is a Mr. Jacob Sheaff; the marſhal is Mr. Rogers; the loan officer is Mr. Pierce, a couſin to the late governor Wentworth, and the collector is Mr. Martin, whoſe wife is ſiſter to Mr. Pierce.

Dwight and Willard, as heads of literary inſtitutions and eccleſiaſtical ſocieties, thus have the chief ſway in Connecticut and New Hampſhire.

THESE EQUIVOCAL WHIGS AND OLD TORIES HAVE THE CONTROL IN OUR NATIONAL AFFAIRS; are conſpicuous in public proceſſions; and wear the weed of mourning for Waſhington, whom they have often branded with the epithet of *Rebel*.

Extract from the Mirror of the 22d of February, 1800.

COMMUNICATION.

We have preſented our readers with a view of the *New England Illuminati*, and a *clue* to *Britiſh*, *tory* or *monarchical* influence, in New-Hampſhire and Connecticut; in which intolerance, and a want of due reſpect to the revolution and its promoters and defenders, muſt be clearly ſeen. This formidable body are hedged round by, or ſhelter themſelves under the *ſedition* law, *tory* marſhals and juries, which may be packed out of Britiſh *commiſſaries*, and the plunderers of our farms, the murderers of our fathers, brothers and ſons, or thoſe who burned our churches, and laid waſte our literary and benevolent inſtitutions during the laſt war.

Extract from the Mirror of March 18th, 1800.

FOR THE MIRROR, &c.

What are the fruits of John Adams's *adminiſtration*? He has engaged to pay 8 per cent. on five millions of dollars—He has eſtabliſhed a ſtanding army, which beſides its enormous expenſe of four millions and two hundred thouſand dollars, keeps a number of citizens in fear of their lives.

He has obtained an appropriation for ſupporting fortifications, of 700,000 dollars. For the navy 1799, four millions three hundred and fifty thouſand dollars, amounting in the whole to nine millions

two hundred and fifty thousand dollars, exclusively of a number of voluntary and unascertained subscriptions, for building and equipping vessels of war, for which the subscribers receive interest, at 8 per cent.

He has levied a *direct tax*, which in this state amounts to more than the whole of the tax paid into our state treasury.

He has procured the enaction of an alien and sedition law, which are a curse to any country in which they exist.

He has given orders to one of our judges to deliver up Jonathan Robbins, an American seaman, to be tried by a British court martial, though the name of the person accused was Nash; in direct contradiction to the laws of nations, and of our constitution.

And finally, He is to have a new loan of 3,500,000 dollars, for which *he* will be obliged to pay 8, and probably 10 per cent.

No. VIII.

Copy of the conclusion of a charge delivered and read from the original manuscript at a circuit court of the United States, holden in the city of Baltimore, on Monday the 2d day of May, 1803, by Samuel Chase, one of the judges of the supreme court of the United States.

Before you retire, gentlemen, to your chamber to consider such matters as may be brought before you, I will take the liberty to make a few observations; which I hope you will receive as flowing only from my regard to the welfare and prosperity of our common country.

It is essentially necessary at all times, but more particularly at the present, that the public mind should be truly informed; and that our citizens should entertain correct principles of government, and fixed ideas of their social rights. It is a very easy task to deceive or mislead the great body of the people, by propagating plausible, but false doctrines; for the bulk of mankind are governed by their passions, and not by reason.

Falsehood can be more readily disseminated than truth, and the latter is heard with reluctance if repugnant to popular prejudice. From the year 1776, I have been a decided and avowed advocate for a representative, or republican form of government, as since established by our state and national constitutions. It is my sincere wish that freemen should be governed by their representatives, fairly and freely elected by that class of citizens, described in our bill of rights, "who have property in, a common interest with, and an attachment to, the community."

The purposes of civil society are best answered by those governments, where the public safety, happiness, and prosperity are best secured; whatever may be the constitution or form of government; but the history of mankind (in ancient and modern times) informs us "that a monarch may be free; and that a republic may be a tyranny." The true test of liberty is in the practical enjoyment of protection to the person and the property of the citizen, from all enquiry. Where the same laws govern the whole society without any distinction, and there is no power to dispense with the execution of the laws; where justice is impartially and speedily administered, and the poorest man in the community may obtain redress against the most wealthy and powerful, and riches afford no protection to violence; and where the person and property of every man are secure from insult and injury in that country the people are free. This is our present situation. Where law is uncertain, partial, or arbitrary; where justice is not impartially administered to all; where property is insecure, and the person is liable to insult and violence, without redress by law, the people are *not free*, whatever may be their form of government. To this situation, I greatly fear we are fast approaching!

You know, gentlemen, that our state and national institutions were framed to secure to every member of the society, equal liberty and equal rights; but the late alteration of the federal judiciary by the abolition of the offices of the sixteen circuit judges, and the recent change in our state constitution, by the establishing of universal suffrage, and the further alteration that is contemplated in our state judiciary (if adopted) will, in my judg-

ment, take away all security for property and personal liberty. The independence of the national judiciary, is already shaken to its foundation, and the virtue of the people alone can restore it. The independence of the judges of this state will be entirely destroyed, if the bill for the abolition of the two supreme courts should be ratified by the next general assembly. The change of the state constitution, by allowing universal suffrage, will, in my opinion, certainly and rapidly destroy all protection to property, and all security to personal liberty; and our republican constitution will sink into a mobocracy, the worst of all possible governments.

I can only lament, that the main pillar of our state constitution, has already been thrown down by the establishment of universal suffrage. By this shock alone, the whole building totters to its base, and will crumble into ruins, before many years elapse, unless it be restored to its original state. If the independency of your state judges, which your bill of rights wisely declares "to be essential to the impartial administration of justice, and the great security to the rights and liberties of the people," shall be taken away by the ratification of the bill passed for that purpose, it will precipitate the destruction of your whole state constitution; and there will be nothing left in it, worthy the care or support of freemen.

I cannot but remember the great and patriotic characters, by whom your state constitution was framed. I cannot but recollect that attempts were then made in favor of universal suffrage; and to render the judges dependant upon the legislature. You may believe, that the gentlemen who framed your constitution, possessed the full confidence of the people of Maryland, and that they were esteemed for their talents and patriotism, and for their public and private virtues. You must have heard that many of them held the highest civil and militaty stations, and that they, at every risk and danger, assisted to obtain and establish your independence. Their names are enrolled on the journals of the first Congress, and may be seen in the proceedings of the convention that framed our form of government. With great concern I observe, that the sons of some of these characters have united to pull down the beautiful fabric of wisdom and republicanism, that their fathers erected!

The declarations, respecting the natural rights of man, which originated from the claim of the British parliament to make laws to bind America in all cases whatsoever; the publications, since that period, of visionary and theoretical writers, asserting that men, in a state of society, are entitled to exercise rights which they possessed in a state of nature; and the modern doctrines by our late reformers, that all men, in a state of society, are entitled to enjoy equal liberty and equal rights, have brought this mighty mischief upon us; and I fear that it will rapidly progress, until peace and order, freedom and property, shall be destroyed. Our people are taught as a political creed, that men, living under an established government, are nevertheless entitled to exercise certain rights which they possessed in a state of nature; and also, that every member of this government is entitled to enjoy an equality of liberty and rights.

I have long since subscribed to the opinion, that there could be no rights of man in a state of nature, previous to the institution of society; and that liberty properly speaking, could not exist in a state of nature. I do not believe that any number of men ever existed together in a state of nature, without some head, leader or chief, whose advice they followed, or whose precepts they obeyed. I really consider a state of nature as a creature of the imagination only, although great names give a sanction to a contrary opinion. The great object for which men establish any form of government, is to obtain security to their persons and property, from violence, destroy the security to either, and you tear up society by the roots. It appears to me that the institution of government is really no sacrifice made, as some writers contend, to natural liberty, for I think that previous to the formation of some species of government, a state of liberty could not exist. It seems to me that personal *liberty* and *rights*, can only be acquired by becoming a member of a community, which gives the protection of the whole to every individual. With-

out this protection it would, in my opinion, be impracticable to enjoy perſonal liberty or rights. From hence I conclude that liberty, and rights, (and alſo property) muſt ſpring out of civil ſociety, and muſt be forever ſubject to the modification of particular governments. I hold the poſition clear and ſafe, that all the rights of man can be derived only from the *conventions* of ſociety, and may with propriety be called ſocial rights. I cheerfully ſubſcribe to the doctrine of equal liberty and equal rights, if properly explained. I underſtand by equality of liberty and rights, only this, that every citizen, without reſpect to property or ſtation, ſhould enjoy an equal ſhare of civil liberty; an equal protection from the laws, and an equal ſecurity for his perſon and property. Any other interpretation of theſe terms, is in my judgment, deſtructive of all government and all laws. If I am ſubſtantially correct in theſe ſentiments, it is unneceſſary to make any application of them, and I will only aſk two queſtions. Will juſtice be impartially adminiſtered by judges dependant on the legiſlature for their continuance in office, and alſo for their ſupport? Will liberty or property be protected or ſecured, by laws made by repreſentatives choſen by electors, who have no property in, a common intereſt with, or attachment to, the community?

True copy, THOMAS CHASE.

January 31*st*, 1805.

A true copy, from the original on file,

ATTEST, SAMUEL A. OTIS,

Secretary of the Senate.

THE FOLLOWING

IS A

Table of the Votes,

GIVEN

ON THE SEVERAL ARTICLES OF IMPEACHMENT.

	Art. 1	*Art.* 2	*Art.* 3	*Art.* 4	*Art.* 5	*Art.* 6	*Art.* 7	*Arttcle* 8.
Mr. Adams, Ms.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Anderſon, Ten.	g	g	g	g	n g	n g	n g	g
Mr. Baldwin, Geo.	g	n g	g	n g	n g	n g	n g	g
Mr. Bayard, Del.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Bradley, Vt.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Breckenridge, K.	g	g	g	g	n g	g	g	g
Mr. Brown, K.	g	n g	g	g	n g	n g	n g	g
Mr. Cocke, Ten.	g	g	g	g	n g	g	g	g
Mr. Condit, N. J.	g	g	g	g	n g	n g	n g	g
Mr. Dayton, N. J.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Ellery, R. I.	g	g	g	g	n g	n g	n g	g
Mr. Franklin, N. C.	g	n g	g	g	n g	n g	g	g
Mr. Gaillard, S. C.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Giles, Va.	n g	g	g	g	n g	n g	n g	g
Mr. Hillhouſe, Con.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Howland, R. I.	g	g	g	g	n g	g	g	g
Mr. Jackſon, Geo.	n g	n g	g	g	n g	n g	g	g
Mr. Logan, Pa.	g	n g	g	g	n g	n g	n g	g
Mr. Maclay, Pa.	g	g	g	g	n g	g	g	g
Mr. Mitchill, N. Y.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Moore, Va.	g	g	g	g	n g	n g	n g	g
Mr. Olcot, N. H.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Pickering, Ms.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Plumer, N. H.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Iſrael Smith, Vt.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. J. Smith, N. Y.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. J. Smith, Ohio,	n g	n g	n g	n g	n g	n g	n g	n g
Mr. S. Smith, Md.	n g	n g	g	g	n g	n g	g	g
Mr. Stone, N. C.	g	n g	n g	g	n g	n g	g	g
Mr. Sumpter, S. C.	g	g	g	g	n g	n g	g	g
Mr. Tracy, Con.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. White, Del.	n g	n g	n g	n g	n g	n g	n g	n g
Mr. Worthington, O.	g	n g	g	g	n g	n g	n g	g
Mr. Wright, Md.	g	n g	g	g	n g	n g	g	g
Guilty—	16	10	18	18	0	4	10	19
Not Guilty—	18	24	16	16	34	30	24	15

A correct copy of the opinion of judge Chase in the case of Callender, as delivered, and referred to in Mr. Robertson's testimony.

JUDGE CHASE,

I will assign my reasons why I will not permit the counsel for the traverser to offer arguments to the jury, to urge them to do what the constitution and law of this country will not permit; and which, if I should allow, I should in my judgment, violate my duty, disregard the constitution and law, and surrender up the judicial power of the United States, that is, the power intrusted by the constitution to the federal courts, to a petit jury, in direct breach of my oath of office.

The indictment charges that the traverser on the 1st day of February, 1800, designing and intending to defame *the president* of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, did wickedly and maliciously, write, print, utter, and publish, (or did cause or procure to be printed and published) a false, scandalous and malicious writing, against the said president of the United States, of *the tenor and effect* stated in the indictment. On examining the indictment, it appears, that twenty separate and distinct sets of words are set forth therein, as allegations or charges against the traverser. He has plead "*not guilty*" to *all* of them.

To support this indictment on behalf of the government of the United States, it must be proved to the jury—first that the traverser did write, print, utter or publish, or did cause or procure to be printed or published, a false and scandalous writing against the president of the United States; secondly, that the said writing is false, scandalous and malicious; and thirdly, that it was published with intent to defame the president, &c. as stated in the statute and charged in the indictment.

If these three facts shall be established to the satisfaction of the jury, they must find the traverser *guilty, generally*, unless he can prove to them *the truth of the matter contained in the publication*, in which case, the statute on which the traverser is indicted excuses him. If *all the twenty* sets of words stated in the indictment as charges, against the traverser, shall not be proved against him; or *if* he can prove that *any* of them *are true*, the jury will acquit him of such of them as shall not be established against him, and also of such of them as he can prove to be true; and they will find him guilty of the residue.

These enquiries on behalf of the government of the United States, and on the part of the traverser, are proper for, and within the *jurisdiction* and the terms of the oath of the petit jury, who have been sworn, "that they will well and truly try *the issue joined*, between the United States and the traverser at the bar, and a true verdict give *according to their evidence*." The issue joined therefore is, whether the traverser is guilty of the *several* offences, charged in the indictment; and to this issue *no evidence* is admissible (on the part of the government, or of the traverser) but what is pertinent or applicable to it. The petit jury to discharge their duty must first enquire, whether the traverser committed *all* or *any* of the facts alledged in the indictment to have been done by him, some time *before* the indictment. If they find that he did commit all or any of the said facts, their next enquiry is, whether the doing such facts have been made *criminal* and punishable by the *statute* of the United States, on which the traverser is indicted. For this purpose they must peruse the statute and carefully examine, whether the facts *charged and proved*, are within the provisions of it. If the words that create the offence are plain and intelligible, they must then determine, whether the offence proved is of the species of criminality charged in the indictment, but if the words are imbiguous or doubtful, all construction should be rejected.—The statute on which the traverser is indicted enacts, "that the jury who shall try the cause shall have a right to determine *the law and the fact*, under the direction of the court, as in other cases." By this provision I understand, that a *right* is given to the jury to determine what *the law is* in the case before them; and not to decide whether a statute of the United States produced to them, is *a law or not*, or whether it is *void*, under an opinion that it is unconstitutional, that is, *contrary to the constitution* of the United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done, are prohibited by the law; and whether they amount to the offence described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the *guilt* or *innocence* of the person accused. It is one thing to decide *what the law is* on the facts proved, and another, and a very different thing, to determine, that the statute produced *is no law*. To decide what the law is on the facts, is an admission that the law exists. If there be *no law* in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them.

The existence of the law is a *previous* enquiry, and the enquiry into facts is altogether unnecessary, if there is no law to which the facts can apply. By this right to decide what *the law is* in any case arising under the statute,

I cannot conceive that a right is given to the petit jury to determine, whether the ſtatute (under which they claim this right) is *conſtitutional or not*. To determine the validity of the ſtatute, the conſtitution of the United States muſt neceſſarily be reſorted to and conſidered, and its proviſions enquired into. It muſt be determined whether the ſtatute alledged to be void, becauſe contrary to the conſtitution, is prohibited by it *expreſsly*, or by *neceſſary implication*. Was it ever intended by the framers of the conſtitution, or by the people of America, that it ſhould ever be ſubmitted to the examination of a jury, to decide what reſtrictions are *expreſsly* or *impliedly* impoſed by it on the national legiſlature? I cannot poſſibly believe, that congreſs intended by the ſtatute to grant a right to a petit jury to declare a ſtatute void. The man who maintains this poſition, muſt have a moſt contemptible opinion of the underſtanding of that body: but I believe the defect lies with himſelf.

If any one can be ſo weak in intellect, as to entertain this opinion of congreſs, he muſt give up the exerciſe of the power, when he is informed *that congreſs had no authority* to veſt it in any body whatſoever; becauſe, by the conſtitution, (as I will hereafter ſhew) this right is expreſsly granted to the *judicial power* of the United States, and is recognized by congreſs by a perpetual ſtatute. If the ſtatute ſhould be held void by a jury, it would ſeem that they could not claim a right to ſuch deciſion under an act that they themſelves conſider as *mere waſte paper*. Their right muſt therefore be derived from ſome other ſource.

It appears to me, that all the rights, powers, and duties of the petit jury, ſworn in this cauſe, can only be derived from the conſtitution, or ſtatutes of the United States made agreeably to it; or from ſome ſtatute of this commonwealth not contrary to the federal conſtitution, or ſtatutes of congreſs; or from the common law, which was adopted by the federal conſtitution in the caſe of trials by jury in *criminal* caſes.

It never was pretended, as I ever heard, before this time, that a petit jury in England, (from whence our common law is derived) or in any part of the United States ever exerciſed ſuch power. If a petit jury can *rightfully* exerciſe this power over one ſtatute of congreſs, they muſt have an equal right and power over any other ſtatute, and indeed over *all* the ſtatutes; for no line can be drawn, no reſtriction impoſed on the exerciſe of ſuch power; it muſt reſt in diſcretion only.

If this power be once admitted, petit jurors will be ſuperior to the national legiſlature, and its laws will be ſubject to their control. The power to abrogate or to make laws nugatory, is equal to the authority of making them. The evident conſequences of this right in juries, will be, that a law of congreſs will be in operation in one ſtate, and not in another. A law to impoſe taxes will be obeyed in one ſtate, and not in another, unleſs force be employed to compel ſubmiſſion.

The doing *certain* acts will be held *criminal*, and puniſhed in one ſtate, and ſimilar acts may be held innocent, and even approved and applauded in another.

The effects of the exerciſe of this power by petit jurors may be readily conceived. It appears to me that the right now claimed has a direct tendency to diſſolve the union of the United States, on which, under Divine Providence, our political ſafety, happineſs, and proſperity depend.

No citizen of knowledge and information, unleſs under the influence of paſſion or prejudice, will believe, without very ſtrong and indubitable proof, that congreſs will, *intentionally*, make any law in violation of the federal conſtitution, and their ſacred truſt. I admit that the conſtitution contemplates, that congreſs may, from inattention or error in judgment, paſs a law prohibitted by the conſtitution; and therefore it has provided a peaceable, ſafe, and adequate remedy. If ſuch a caſe ſhould happen, the mode of redreſs is pointed out in the conſtitution, and no other mode can be adopted, without a manifeſt infraction of it.

Every man muſt admit, that the power of deciding the conſtitutionality of any law of the United States, (or of any particular ſtate) is one of the greateſt and moſt important powers the people could grant.

Such power is reſtrictive of the legiſlative power of the union, and alſo of the ſeveral ſtates; not abſolute and unlimited, but confined to ſuch caſes only, where the law in queſtion ſhall clearly appear to have been *prohibited* by the federal conſtitution, and not in any doubtful caſe. On referring to the ninth ſection of the firſt article of the conſtitution, there may be ſeen many reſtrictions impoſed on the powers of the national legiſlature, and alſo on the powers of the ſeveral ſtate legiſlatures. Among the ſpecial exceptions to their authority, is the power to make *expoſt facto* laws, to lay any capitation, or other direct tax, unleſs in proportion to the cenſus; to lay any tax or duty on articles exported from any ſtate, &c. &c.

It ſhould be remembered that the *judicial power* of the United States, is co-exiſtent, co-extenſive, and co-ordinate with, and altogether independent of the federal legiſlature, or the

executive. By the ſixth article of the conſtitution (among other things) it is declared, that the conſtitution ſhall be the ſupreme law of the land. By the third article it is eſtabliſhed, that "the judicial power of the United States ſhall be veſted in one ſupreme court, and in ſuch other inferior courts as congreſs may from time to time ordain and eſtabliſh, and that the judicial power ſhall extend to all caſes in law, and equity ariſing under the conſtitution and laws of the United States."

Among the caſes which may ariſe under the *conſtitution*, are all the reſtrictions on the authority of congreſs, and of the ſtate legiſlatures. It is very clear, that the *preſent* caſe ariſes under the *conſtitution*, and alſo under *a law* of the United States, and therefore it is the very caſe, to which the conſtitution declares the judicial powers of the United States ſhall extend.

It is incontrovertible that the conſtitution is the ſupreme law, and therefore it muſt be the rule by which the federal and ſtate judges are bound to regulate their deciſions. By the ſixth article of the conſtitution, it is provided (among other things) that all the members of congreſs and of the ſeveral ſtate legiſlatures, and all judicial officers of the United States, and of the ſeveral ſtates, ſhall be bound by an oath or affirmation, to *ſupport the conſtitution*. By this proviſion I underſtand, that every perſon, ſo ſworn or affirmed, promiſes, that he will preſerve the conſtitution as eſtabliſhed, and the diſtribution of powers thereby granted; and that he will not aſſent to any amendment or alteration thereof, but in the mode preſcribed in the 5th article: and that he will not conſent to any uſurpation by any one branch of the legiſlature upon the other, or upon the executive, or by the executive upon either branch, or by any department or officer of government, of the power granted to another; or that the power granted to either ſhall be exerciſed by others.

I alſo underſtand by this engagement, that the perſon taking it, promiſes alſo that he will oppoſe by his example, argument, advice, and perſuaſion, and by all other means in his power, *force only* excepted, any deſign, advice or attempt, to impair or deſtroy the conſtitution.

If this expoſition of this ſolemn obligation is *ſubſtantially* correct, I cannot believe that any perſon having the ſame underſtanding of it, will maintain that a petit jury can *rightfully* exerciſe the power granted by the conſtitution to the federal judiciary.

From theſe conſiderations I draw this concluſion, that the judicial power of the United States, is the only *proper and competent authority* to decide whether any ſtatute made by congreſs (or any of the ſtate legiſlatures) is contrary to, or in violation of, the federal conſtitution.

That this was the opinion of the ſenate and houſe of repreſentatives, and of General Waſhington, then preſident of the United States, fully appears by the ſtatute, entitled, "An act to eſtabliſh the judicial courts of the United States." made at the firſt ſeſſion of the firſt congreſs, (on 24th September, 1789) chap. 20, ſect. 8, which enacts, "that the juſtices of the ſupreme courts and the diſtrict judges ſhall take an oath or affirmation in the following words, to wit:

"I, A. B. do ſolemnly ſwear or affirm, that I will adminiſter juſtice without reſpect to perſons, and do equal right to the poor and to the rich, and that I will faithfully and impartially diſcharge and perform all the duties incumbent on me as , according to the beſt of my abilities and underſtanding, agreeably to the conſtitution and laws of the United States."

No poſition can be more clear than that all the federal judges are bound by the ſolemn obligation of religion, to regulate their deciſions agreeably to the conſtitution of the United States; and that it is the ſtandard of their determination in all caſes that come before them.

I believe that it has been the general and prevailing opinion in all the union, that the power now wiſhed to be exerciſed by a jury, properly belonged to the federal courts.

It was alledged that the tax on carriages, was conſidered by the people of this commonwealth to be unconſtitutional, and a caſe was made to ſubmit the queſtion to the ſupreme court of the United States, and they decided that the ſtatute was not unconſtitutional, and their deciſion was acquieſced in.

I have ſeen a report of a caſe (Kamper *vs.* Hawkins) decided in 1793, in the general court of this commonwealth, reſpecting the conſtitutionality of a law which gave the diſtrict courts a power of granting injunctions in certain caſes, in which caſe the judges of the general court [four to one] determined that the law was *unconſtitutional and void*. On yeſterday I ſaw the record of another caſe, in the court of appeals of this commonwealth [in 1788] on which it appears, that the general aſſembly paſſed "An act to eſtabliſh diſtrict courts," and the judges [ten being preſent] adjudged "that the conſtitution and the ſaid act were in oppoſition, and could not exiſt together, and that the court ought not to do any thing officially in the execution of an act, which appeared to be contrary to the ſpirit of the conſtitution." I alſo obſerved that the then governor Mr. Edmund Randolph, immediately on this deciſion, called the general aſſembly by procla-

mation; and I have been informed that they altered the law according to the opinion of the court.

From these two decisions in the two highest courts of justice in this state, I may fairly conclude, that, at that period, it was thought that the courts of justice were the proper judicature to determine the constitutionality of the laws of this commonwealth. It is now contended, that the constitutionality of the laws of congress, should be submitted to the decision of *a petit jury*. May I ask whence this change of opinion? I declare that the doctrine is entirely novel to me, and that I never heard of it before my arrival in this city. It appears to me to be not only new, but very absurd and dangerous, in direct opposition to, and a breach of the constitution: And I wish those who maintain this doctrine, and *have sworn to support the constitution*, conscientiously to reconsider their opinions, with a calm and deliberate temper, and with minds disposed to find the truth, and to alter their opinion, if convinced of their error.

It must be evident that decisions in the district or circuit courts of the United States will be uniform, or they will become so by the revision and correction of the supreme court; and thereby the same principles will pervade all the union; but the opinions of petit juries, will very probably be different, in different states.

The decision of courts of justice will not be influenced by *political* and *local* principles and prejudices. If inferior courts commit error, it may be rectified; but if juries make mistakes, there can be no revision or control over their verdicts, and therefore there can be no mode to obtain uniformity in their decisions. Besides petit juries are under no obligation by the terms of their oath to decide the constitutionality of any law; their determination therefore will be *extra judicial*. I should also imagine that no jury would wish to have a right to determine such great, important and difficult questions; and I hope no jury can be found, who will exercise the power desired over the statutes of congress, against the opinion of the federal courts.

The gentlemen of the profession know that questions have sometimes occurred in state courts, whether acts of assembly had expired, or had been repealed; but no one will say that such questions were ever submitted to a jury.

If the constitution of the United States had not given to the judiciary a right to decide on the constitutionality of federal laws; yet if such power could be exercised, it could not be by a juror from this consideration: it is a maxim of law in all the states, that the courts have the exclusive right to decide every question as to the *admissibility of evidence* in every case, civil or criminal, whether the evidence be by act of assembly, or by deed or other writing, or by witnesses.

I have consulted with my brother, judge Griffin, and I now deliver the opinion of the court, "That the petit jury have no right to decide on the constitutionality of the statute on which the traverser is indicted; and that if the jury should exercise that power, that they would thereby usurp the authority entrusted by the constitution of the United States to this court." Governed by this opinion, the court will not allow the counsel for the traverser to argue before the petit jury, that they have a right to decide on the constitutionality of the statute, on which the traverser stands indicted. If the counsel for the traverser had offered sufficient arguments to the court, to shew that the petit jury had this right, the court, on being convinced that the opinion delivered was erroneous, would have changed it; for they hold it a much greater reproach for a judge to continue in his error, than to retract.

Judge Chase concluded with observing, that if he knew himself, the opinion he had delivered and the reasons offered in its support, flowed not from *political motives, or reasons of state*, with which he had no concern, and which he conceived never ought to enter courts of justice; but from a deliberate conviction of what the constitution and the law of the land required. "I hold myself equally bound," said he, "to support the rights of the jury, as the rights of the court. I consider it of the greatest consequence to the administration of justice, that the powers of the court, and the powers of the petit jury should be kept distinct and separate. I have uniformly delivered the opinion, "*that the petit jury have a right to decide the law as well as the fact, in criminal cases;*" but it never entered into my mind, that they, therefore, had a right to determine the *constitutionality* of any statute of the United States. It is my duty to execute the laws of the United States, with justice and impartiality, with firmness and decision, and I will endeavor to discharge this duty with the assistance of the fountain of wisdom, and the giver of all human reason and understanding.

FINIS.

B.D. FEB 28 1913